Supreme Court, U.S.
FILED

No. 04-1293

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IN THE

Supreme Court of the United States

KEMAL UZAN, CEM CENGIZ UZAN, MURAT HAKAN UZAN, MELAHAT UZAN, AND AYSEGUL AKAY
Petitioners,

v.

MOTOROLA CREDIT CORP. & NOKIA CORP.,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether a district court has authority to proceed to trial pending the resolution of a non-frivolous appeal pursuant to 9 U.S.C. § 16(a) from an order denying arbitration.

2. Whether the arbitrability of a dispute involving a commercial contract covered by chapter 2 of the Federal Arbitration Act is governed by foreign law rather than by American law because the parties designated a foreign law in their general choice-of-law clause.

PARTIES TO THE PROCEEDINGS BELOW

The parties before the United States Court of Appeals for the Second Circuit were Kemal Uzan, Cem Cengiz Uzan, Murat Hakan Uzan, Melahat Uzan, Aysegul Akay, Antonio Luna Betancourt, Unikom Iletism Hizmetleri Pazarlama A.S. ("Unikom"), Standart Telekomunikasyon Biligsayar Hizmetleri A.S. ("Standard Telekom"), Standart Pazarlama A.S. ("Standart Paz"), Motorola Credit Corporation, and Nokia Corporation.

Unikom, Standart Telekom, and Standart Paz are Turkish companies owned by private individuals or private companies. Each is presently under the management of an instrumentality of the Republic of Turkey.

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court's post-judgment opinion respecting its jurisdiction to conduct a trial pending the appeal (Pet. App. 56a-65a) is reported at 282 F. Supp. 2d 133 (S.D.N.Y. 2003).

JURISDICTION

The judgment of the court of appeals was entered on October 22, 2004. The petition for rehearing was denied on December 16, 2004 (Pet. App. 295a). This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Relevant provisions of the Federal Arbitration Act ("FAA"), 9 U.S.C. § 1 *et seq.*, are set forth in the Appendix to this Petition, Pet. App. 296a-300a.

STATEMENT

The court of appeals' decision in this case—affirming a compensatory judgment award in excess of $ 2.7 billion, possibly the largest in the history of the federal courts—conflicts with the decisions of the other courts of appeals on two recurring issues under the Federal Arbitration Act. The first is whether a district court may proceed to trial on the merits while the court of appeals is considering a non-frivolous appeal, under Section 16 of the FAA, on whether the district court should have compelled arbitration. Rejecting the decisions of the First, Seventh, Eleventh and D.C. Circuits, the Second Circuit in this case joined the Ninth Circuit in holding that district courts may conduct proceedings on the merits—including a trial—while an appeal is *sub judice*. The second question is whether the arbitrability of a dispute is determined by American law and the FAA if the parties have designated a foreign law in a general choice-of-law provision. In the decision below, the court of appeals aligned itself with the D.C. Circuit, but parted company with decisions of the Third, Fourth, Fifth, Sixth and Ninth Circuits. Both issues merit this Court's review.

I. Statutory Framework

Congress enacted the FAA in order to "revers[e] centuries of judicial hostility to arbitration agreements" and to "place arbitration agreements 'upon the same footing as other contracts.'" *Scherk* v. *Alberto-Culver Co.*, 417 U.S. 506, 510-511 (1974) (quoting H.R. Rep. No. 96, 68th Cong., 1st Sess. 1, 1 (1924)). Consistent with the "national policy favoring arbitration" in the FAA, *Southland Corp.* v. *Keating*, 465 U.S. 1, 10 (1984); *Moses H. Cone Mem'l Hosp.* v. *Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983), this Court has determined that, when there is ambiguity concerning the scope of a valid arbitration agreement, that ambiguity must be resolved "in favor of arbitration." *Green Tree Fin. Corp.* v. *Bazzle*, 539 U.S. 444, 451-452 (2003); *Moses H. Cone*, 460 U.S. at 25-26; *Mitsubishi Motors Corp.* v. *Soler Chrysler Plymouth, Inc.*, 473 U.S. 614, 626 (1985).

Section 16(a) of the FAA specifies that "[a]n appeal may be taken from" an order "denying an application under section 4 of this title to order arbitration to proceed," or "denying an application under section 206 of this title to compel arbitration." 9 U.S.C. § 16(a)(1). In addition, Section 16(a) affords a right of immediate appeal from an "interlocutory order granting, continuing, or modifying an injunction against an arbitration that is subject to [the FAA]." 9 U.S.C. § 16(a)(2). Strikingly, however, Section 16(a) specifically forecloses appeals from interlocutory orders "(1) granting a stay of any action under section 3 of [the FAA]; (2) directing arbitration to proceed under section 4 of [the FAA]; (3) compelling arbitration under section 206 of [the FAA]; or (4) refusing to enjoin an arbitration that is subject to [the FAA]," except as otherwise allowed under 28 U.S.C. § 1292. 9 U.S.C. § 16(b). Taken as a whole, then, Section 16 embodies a strong policy favoring arbitration and preserving judicial resources. 15B Wright, Miller & Cooper, *Federal Practice and Procedure: Jurisdiction 2d* § 3914.17 (3d ed. 1992). Once an order com-

pelling arbitration has been entered, no further judicial resources should be expended until the arbitral proceedings have run their course. But as soon as a district court refuses to order arbitration, judicial resources should be directed to immediate review and final resolution of whether the courts should expend their resources resolving the merits of the dispute.

II. Proceedings In This Case

A. The Financing Agreements

The multi-billion dollar judgment awarded in this case arises out of a series of international transactions involving Motorola Credit Corporation ("MCC"), an Illinois corporation, and Nokia Corporation ("Nokia"), a Finnish corporation (acting through a financing agent, ABN-Amro Bank) and Telsim Mobil Telekomunikasyon Hizmetleri A.S. ("Telsim"), a Turkish company. Between 1998 and 2000, when Telsim was Turkey's second-largest cellular telephone company, MCC and Nokia provided Telsim with approximately $ 2.7 billion in vendor financing. One of Telsim's shareholders, Rumeli Telefon Sistemleri A.S. ("Rumeli Telefon") pledged shares of Telsim as collateral to secure the financing.

The financing and share pledge agreements among MCC, Telsim and Rumeli Telefon broadly provided that any unresolved dispute "aris[ing] under the agreement shall be decided, to the exclusion of the ordinary courts, by a three-person arbitration panel in Switzerland in accordance with the International Arbitration Rules of the Zurich Chamber of Commerce." Pet. App. 252a. They further provided that the agreement would be "governed and interpreted in accordance with the internal laws (without regard to the laws of conflicts) of Switzerland." *Ibid.* The agreements among Nokia, its financing agent ABN-Amro, Telsim, and Rumeli Telefon likewise included arbitration provisions that required all disputes "relating to" the agreements be resolved "by a three-member arbitration panel in Switz-

erland in accordance with the International Arbitration Rules of the Zurich Chamber of Commerce." *Id.* at 252a. And the Nokia agreements provided that they would be "governed by, and * * * construed in accordance with Swiss law." *Ibid.*

Telsim repaid approximately $ 200 million of the vendor financing extended by MCC and Nokia. In early 2001, however, the Turkish economy suffered a devastating financial crisis; the Turkish lira suffered an unforeseeable and unprecedented devaluation; and the telecommunications industry suffered a precipitous meltdown throughout the world. This "perfect storm" of economic forces had a devastating impact on Telsim, which found itself unable to make payments according to the schedules set forth in the agreements.

B. The Swiss Arbitrations

In June 2001, ABN-Amro initiated arbitration against Telsim pursuant to the arbitration clauses in the Nokia finance agreements. Over the next three years, ABN-Amro's arbitration proceeding with Telsim progressed in Switzerland. In the proceeding, Telsim asserted the right to reschedule the loans under the Swiss law doctrine of "economic *force majeure*," which allows a party to reform agreements if calamitous events beyond its control make performance impracticable. In February 2004, ABN-Amro was awarded more than $ 707 million, and in September 2004 received rights to certain Telsim shares that Rumeli Telefon had placed in escrow.

Concurrently with the ABN-Amro arbitration, Telsim and Rumeli Telefon in 2002 commenced two arbitration proceedings in Switzerland in connection with MCC's loans. In those proceedings, MCC pursued claims against Telsim in accordance with the arbitration provisions of the respective loan agreements. In January 2004, one of those arbitrations resulted in an interim award in favor of MCC.

C. District Court Proceedings

Six months after ABN-Amro noticed the first arbitration relating to Telsim's vendor financing agreements with Nokia, respondents MCC and Nokia filed this lawsuit in the United States District Court for the Southern District of New York. Respondents did not allege claims against Telsim or Rumeli Telefon, the parties with whom MCC and Nokia had contractual relationships that required arbitration in Switzerland. Instead, MCC and Nokia alleged claims against certain shareholders of Telsim (Standart Telekomunikasyon Bilgisayar Hizmetleri A.S., Unikom Iletism Hizmetleri Pazarlama A.S., and Standart Pazarlama, A.S.), certain individual officers of Telsim and Rumeli Telefon (Cem Uzan and Hakan Uzan), as well as their relatives (Kemal Uzan, Melahat Uzan, and Aysegul Akay) and a close associate (Antonio Luna Betancourt). Respondents alleged claims under the federal RICO statute and under various federal computer privacy statutes. MCC also asserted fraud claims under Illinois common law. Respondents sought monetary relief based on the value of the loans to Telsim, as well as the imposition of a constructive trust on Telsim shares that had been pledged to secure the loans.

From their first appearance before the district court on February 1, 2002, petitioners insisted "this entire dispute is subject to mandatory arbitration provisions in Switzerland," C.A. App. A-246 to A-247, and advised the district court that it "lacks jurisdiction over [respondents'] claims on the ground that those claims are subject to mandatory arbitration provisions in the agreements," *id.* at A-290. The district court, however, first heard a motion for a preliminary injunction before requiring respondents to respond to the motion to compel arbitration.

After conducting evidentiary hearings, the district court found that respondents had demonstrated a likelihood of success on their federal RICO claims and issued a pre-

liminary injunction ordering petitioners to deposit 73.5% of the shares of Telsim's stock (the amount that had been pledged by Rumeli Telefon to secure MCC's and Nokia's loans to Telsim) into the registry of the court.[1] The district court stated that "the arbitration provisions of the Telsim contracts are a total irrelevancy" because MCC and Nokia had not sued Telsim (a signatory to the international agreements requiring arbitration); instead, they had sued Telsim's agents and shareholders. Pet. App. 292a. Petitioners appealed the district court's preliminary injunction pursuant to 28 U.S.C. § 1292(a)(1).

Meanwhile, in accordance with the briefing schedule set by the district court, the parties completed briefing on petitioners' motion to dismiss the complaint and to compel arbitration pursuant to Sections 4 and 206 of the FAA. Petitioners maintained that MCC and Nokia could not avoid their arbitration obligations by suing non-signatories to the arbitration agreements since their claims presented issues—specifically Telsim's liability, if any, under the loan agreements—that were subject to the arbitration agreements. See *Smith/Enron Cogeneration, Ltd.* v. *Smith Cogeneration Int'l, Inc.*, 198 F.3d 88, 98 (2d Cir. 1999); *Campaniello Imports, Ltd.* v. *Saporiti Italia S.p.A.*, 117 F.3d 655, 668 (2d Cir. 1997) (holding that "employees or disclosed agents of an entity that is a party to an arbitration agreement are protected by that agreement.").

The district court denied petitioners' motion to compel arbitration and enjoined petitioners (and non-parties Telsim and Rumeli Telefon) from pursuing the Swiss arbitrations against MCC. Pet. App. 267a-274a. The court held that "none of the [petitioners] is party to the underlying arbi-

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[1] With respondents' motion for a preliminary injunction pending before the district court, courts of the Republic of Turkey, acting on complaints by Telsim's Turkish creditors, entered injunctions against Telsim and certain defendants prohibiting them from transferring shares of Telsim's stock. Pet. App. 6a.

tration agreements" and "nothing in Motorola's or ABN-Amro's agreements to arbitrate * * * can reasonably be read to constitute an agreement to arbitrate with Telsim plaintiffs' tort allegations * * * ." Pet. App. 271a-272a. It concluded that the Swiss arbitration proceedings "were commenced in an effort to undercut the prior orders of, and proceedings before, this Court." *Id.* at 272a.

Petitioners appealed from the order denying arbitration under Section 16(a) of the FAA, and the appeal was consolidated with their challenge to the district court's grant of preliminary relief. Petitioners also moved for a stay of further district court proceedings pending the court of appeals' decision. The district court denied the stay on the ground that petitioners' appeal was "frivolous"; Section 16(a) of the FAA, the court stated, "has no application where, as here, none of the moving defendants is a party to the arbitrations in question." Pet. App. 265a.

Petitioners then applied to the court of appeals for a stay. The court of appeals neither acted on the motion nor explained its failure to do so. The district court then proceeded to conduct a trial on the merits of respondents' federal RICO claims over petitioners' objection. Petitioners advised the district court that, in their view, it had no jurisdiction to proceed on the merits while the Section 16(a) appeal was pending. Accordingly, neither petitioners nor their counsel participated in the district court's "trial."

D. The Court Of Appeals' First Decision

Three weeks after the district court completed its "trial," the court of appeals directed that the district court *dismiss* the federal RICO claims at the heart of that trial. Pet. App. 250a-263a. Reflecting the centrality of the Swiss arbitrations to respondents' allegations, the court of appeals' *per curiam* decision held that respondents did not have standing to bring federal RICO claims because those claims were not ripe. *Id.* at 256a (citing *First Nationwide Bank* v. *Gelt Funding Corp.*, 27 F.3d 763, 768 (2d Cir.

1994)). The court of appeals explained that respondents had not foreclosed on the loans at issue, and that their authority to foreclose on the loans depended on the outcome of the arbitration proceedings that had been enjoined by the district court. *Id.* at 257a-258a. The court of appeals observed that, until those arbitration proceedings were concluded, and it was determined how much Telsim owed under the finance agreements, it was not possible to determine whether MCC or Nokia had suffered "loss" as a result of the alleged RICO conspiracy. *Id.* at 258a-259a. Until the "loss" attributable to the alleged RICO conspiracy could be established, the court concluded, respondents' federal RICO claims were not ripe. *Ibid.*

In light of the "changed landscape" of the case created by dismissal of the federal RICO claims—and the court of appeals' recognition that those claims would not be ripe until the conclusion of arbitrations that the district court had enjoined—the court of appeals remanded various issues for reconsideration, including petitioners' motion to compel arbitration. Pet. App. 260a. Recognizing that it had not acted on petitioners' motion for a stay pending appeal, the court of appeals dismissed it as moot. *Id.* at 263a.

E. The District Court's Remand Ruling

Following supplemental briefing, but without further evidentiary proceedings, the district court issued a 172-page Memorandum Opinion and Order based on the "trial" it had conducted in February 2003 without petitioners' participation. The district court dismissed respondents' federal RICO claims as required by the court of appeals (leaving no federal claims in the case). But it awarded MCC $ 4,265,793,811.32 in compensatory and punitive damages under Illinois law. In addition, the district court awarded MCC equitable ownership of 66% of Telsim's outstanding shares, and Nokia equitable ownership of 7.5% of Telsim's outstanding shares. Finally, the district court held that "plaintiffs are entitled to collect their judgments" from the

assets of more than 130 entities found to be owned or controlled, directly or indirectly, by petitioners. Pet. App. 246a-247a.

On September 12, 2003, after petitioners had filed notices of appeal, the district court published a decision abandoning its earlier suggestion that petitioners' Section 16(a) appeal was frivolous or commenced in bad faith. Instead, the court indicated that it had exercised discretion to conduct the trial to promote "judicial economy, the avoidance of piecemeal decisions, and the like." Pet. App. 56a-65a.

F. The Court Of Appeals' Second Decision

Petitioners timely filed notices of appeal, and extended motions practice ensued. A stay of execution was entered pending appeal, Pet. App. 66a, and a motions panel agreed that "it appears likely that the district court improperly denied the motion to compel arbitration," *id.* at 54a. The motions panel initially dismissed petitioners' appeals under the fugitive disentitlement doctrine. *Ibid.* After purporting to deny rehearing and rehearing en banc, *id.* at 51a-52a, however, the court of appeals entered a further order reinstating the formerly dismissed appeals and directing that the appeals and all pending motions be heard by a full panel of the court of appeals. *Id.* at 49a-50a.

Following oral argument, the court of appeals requested additional briefing on several issues, including whether the FAA or Swiss law determines the arbitrability of respondents' claims, and whether respondents' claims were arbitrable under Swiss law.

On October 22, 2004, the court of appeals reversed in part and affirmed in part. The court of appeals acknowledged that, contrary to the district court's initial opinion, petitioners' "appeal [pursuant to Section 16(a) of the FAA] was not frivolous." Pet. App. 23a. But it held that the district court had authority to proceed to trial notwithstanding that ongoing, non-frivolous Section 16(a)

appeal. Recognizing that the "circuits are divided on this question," the Second Circuit panel joined the Ninth Circuit in holding that "an order denying a motion to compel arbitration 'does not deprive the trial court of jurisdiction over other proceedings in the case.'" Pet. App. 25a (quoting *Britton* v. *Co-op Banking Group*, 916 F.2d 1405, 1412 (9th Cir. 1990)). The Second Circuit explicitly disagreed with "the Seventh and Eleventh Circuits [that] have held that a district court may not proceed after the filing of a non-frivolous appeal from an order denying arbitration." *Ibid.* (citing *Blinco* v. *Green Tree Servicing, L.L.C.*, 366 F.3d 1249, 1251 (11th Cir. 2004); *Bradford-Scott Data Corp.* v. *Physician Computer Network, Inc.*, 128 F.3d 504, 507 (7th Cir. 1997)).

Turning to the issue of arbitrability, the Second Circuit acknowledged that many of its precedents had construed the FAA to preclude parties like MCC and Nokia from evading an agreement to arbitrate by suing non-signatory agents and affiliates. In this case, however, the Second Circuit held that arbitrability had to be determined under Swiss law rather than under the FAA because of the general choice-of-law provisions in the finance agreements. Pet. App. 18a-19a. That result, the court stated, "is necessary to ensure uniform interpretation and enforcement of that agreement and to avoid forum shopping." *Id.* at 19a.

Based on the supplemental briefing before it, the court of appeals concluded "that under Swiss law, defendants, as non-signatories to the agreements, *may not* invoke the arbitration clauses contained in those agreements." Pet. App. 20a. The court recognized that, under Swiss law, "a non-signatory may be required to arbitrate in certain circumstances where it acts in bad faith." *Id.* at 21a. But it held that Swiss law does not allow non-signatories to invoke an arbitration clause to which they are not a party. *Ibid.* In a footnote, the court of appeals dismissed petitioners' argument that, if Swiss law were to apply, that law required

reference of the arbitrability issue to arbitrators for decision in the first instance. Citing *Mitsubishi Motors*, 473 U.S. at 628, the court of appeals held that the district court "properly undertook to determine whether the parties had an agreement to arbitrate." Pet. App. 22a n.11.[2]

REASONS FOR GRANTING THE PETITION

The Second Circuit's decision in this case expands circuit conflicts on two recurring and important questions under the Federal Arbitration Act, and takes the minority view with respect to both. First, after acknowledging that the "circuits are divided on this question," the Second Circuit adopted the Ninth Circuit's position that trial courts may conduct further proceedings on the merits of a case (including a trial) while appellate courts are reviewing, on non-frivolous interlocutory appeal, the denial of a motion to compel arbitration. Pet. App. 25a (quoting *Britton*, 916 F.2d at 1412). That holding conflicts with the decisions of the First, Seventh, Eleventh and District of Columbia Circuits, all of which have held that trial courts lack authority to conduct trials while the court of appeals is considering whether arbitration should have been com-

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[2] The court of appeals reversed the district court on various other issues, holding that (a) the district court had erroneously failed to test the punitive damages award for excessiveness under Illinois law; (b) that there was an insufficient basis for allowing the award to be collected from non-party corporations; and (c) that the district court had erred in attempting to promote collection through its injunctive authority. Pet. App. 34a-44a. It affirmed in other respects, holding that the district court had not abused its discretion in exercising supplemental jurisdiction over respondents' state-law claims after dismissal of all federal law claims (*id.* at 26a-30a); had reasonably interpreted Illinois law to allow pursuit of a fraud claim before the existence and amount of damages had become certain (*id.* at 30a-34a); and had reasonably exercised personal jurisdiction over the individual petitioners (*id.* at 34a). In a separate opinion, the court of appeals declined to dismiss the appeals of individual petitioners under the fugitive disentitlement doctrine. *Id.* at 47a-48a.

pelled (and thus whether there should be any district court proceedings at all). *Blinco*, 366 F.3d at 1251; *Bradford-Scott*, 128 F.3d at 507; *Bombardier Corp.* v. *Nat'l Ry. Passenger Corp.*, No. 02-7125, 2002 WL 31818924, at *1 (D.C. Cir. Dec. 12, 2002); *Lummus Co.* v. *Commonwealth Oil Refining Co.*, 273 F.2d 613, 613-614 (1st Cir. 1959).

Second, the court below held that the law selected through a general choice-of-law provision, rather than federal law, governs the arbitrability of a particular dispute under an agreement providing for arbitration. The effect of a general choice-of-law provision on arbitrability disputes and arbitration procedures has been disputed in decisions of the courts of appeals since this Court's decisions in *Volt Info. Sciences, Inc.* v. *Board of Trustees of Leland Stanford Junior Univ.*, 489 U.S. 468 (1989), and *Mastrobuono* v. *Shearson Lehman Hutton, Inc.*, 514 U.S. 52 (1995). Most federal courts have rejected the approach adopted by the Second Circuit in this case and instead have held that a general choice-of-law clause does *not* displace the FAA as the basis for resolving disputes over the arbitrability of particular claims. *Roadway Package Sys.* v. *Kayser*, 257 F.3d 287, 297 (3d Cir. 2001); *Porter Hayden Co.* v. *Century Indem. Co.*, 136 F.3d 380, 382 (4th Cir. 1998); *Wolsey, Ltd.* v. *Foodmaker, Inc.*, 144 F.3d 1205, 1211 (9th Cir. 1998); *Ferro Corp.* v. *Garridon Indus., Inc.*, 142 F.3d 926, 938 (6th Cir. 1998).

The questions presented in this case are of great significance to the pro-arbitration policy implemented by the FAA. By allowing appeals from the denial of asserted arbitration rights, Section 16(a) of the FAA protects parties asserting arbitration rights from the costs of litigating potentially arbitrable disputes and ensures efficient use of judicial resources. By vesting district courts with authority to conduct proceedings and trials pending interlocutory appeals under Section 16(a), the Second Circuit improperly undermines the fundamental purpose of Section 16(a).

Moreover, the FAA was passed to ensure uniform enforcement of contracting parties' intent with respect to arbitration. The Second Circuit's holding that the law selected through a general choice-of-law clause, rather than the FAA, governs arbitrability questions will force federal courts—including those encompassing some of the Nation's largest commercial centers—to apply a disparate range of foreign laws in discerning parties' intent regarding arbitration. That approach will routinely lead to manifest error of the kind committed in this case.

I. Whether A District Court Has Authority To Proceed While A Section 16(a) Appeal Is Pending Is An Important And Unresolved Question On Which Courts Of Appeals Disagree

A. There Is A Conflict Among The Courts Of Appeals

This Court has long recognized that "a federal district court and a federal court of appeals should not attempt to assert jurisdiction over a case simultaneously." *Griggs* v. *Provident Consumer Disc. Co.*, 459 U.S. 56, 58 (1982). "The filing of a notice of appeal is an event of jurisdictional significance—it confers jurisdiction on the court of appeals and divests the district court of its control over those aspects of the case involved in the appeal." *Ibid.*; *Marrese* v. *Am. Acad. of Orthopaedic Surgeons*, 470 U.S. 373, 378 (1985); Pet. App. 23a. "So complete is the transfer of jurisdiction that any orders of the district court touching upon the substance of the matter on appeal are considered null and void if entered subsequent to the timely filing of the notice of appeal." 15A Wright, Miller & Cooper, *Federal Practice & Procedure* § 3949.1 (3d ed. 1999). Only matters entirely collateral to the issues on appeal remain within the district court's jurisdiction. See *Apostol* v. *Gallion*, 870 F.2d 1335, 1337-1338 (7th Cir. 1989); *United States* v. *Rivera*, 844 F.2d 916, 921 (2d Cir. 1988).

1. Applying that principle in the context of appeals under Section 16(a)(1) of the FAA, the Seventh, Eleventh

and District of Columbia Circuits have held that district courts lack authority to proceed to trial while the denial of a motion to compel arbitration is before the court of appeals on interlocutory appeal. As Judge Easterbrook explained in *Bradford-Scott*, a valid arbitration agreement gives parties the right to avoid proceedings in district court in favor of the arbitral forum selected in the agreement. 128 F.3d at 505. Consequently, when a party appeals an order refusing to compel arbitration, the conduct of further proceedings in the district court (such as a trial) is not separate from or "collateral to" the issue on appeal. *Ibid.* Quite the opposite: "[W]hether the litigation may go forward in the district court is precisely what the court of appeals must decide." *Id.* at 506. Thus, "continuation of proceedings in the district court largely defeats the point of the appeal." *Id.* at 505.

Echoing that rationale, the Eleventh Circuit has explained:

> The only aspect of the case involved in an appeal from an order denying a motion to compel arbitration is whether the case should be litigated at all in the district court. The issue of continued litigation in the district court is not collateral to the question presented by an appeal under § 16(a)(1)(A); "it is the mirror image of the question presented on appeal."

Blinco, 366 F.3d at 1251 (quoting *Bradford-Scott*, 128 F.3d at 505). Precisely because an arbitration clause "gives the party moving to enforce an arbitration provision a right not to litigate the dispute in a court and bear the associated burdens," the Eleventh Circuit joined the Seventh Circuit in holding that it would be improper for district courts to conduct proceedings on the merits of a dispute pending resolution of appeals as to the arbitrability of the same dispute. *Id.* at 1252.

The First Circuit made precisely that point more than 40 years ago, even before Section 16 of the FAA was

enacted. *Lummus*, 273 F.2d at 613-614. Addressing whether discovery could proceed while a district court order staying arbitration is on appeal, the First Circuit in *Lummus* held that "a court order of discovery would be affirmatively inimical to [the plaintiff's] obligation to arbitrate, if this court determines it to have such obligation." 273 F.2d at 613. Because extensive discovery "will be unavailable" in arbitration, the court explained, allowing such discovery in district court pending appeal would expose the defendant to burdens that the agreement to arbitrate gave him a right to avoid—and would give the plaintiff discovery he agreed to give up. *Id.* at 613-614. "Until it is determined whether this action has been properly brought, [the plaintiff] should not receive any unnecessary fruits thereof." *Ibid.*

Now that Congress has expressly provided for interlocutory appeals in Section 16(a)(1)(A) of the FAA, the grounds for denying district courts any power to proceed are even more clear. "By providing a party who seeks arbitration with swift access to appellate review, Congress acknowledged that one of the principal benefits of arbitration, avoiding the high costs and time involved in judicial dispute resolution, is lost if the case proceeds in both judicial and arbitral forums." *Blinco*, 366 F.3d at 1251.[3]

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[3] See also 134 Cong. Rec. S 16309 (daily ed. Oct. 14, 1988) (section by section analysis of S. 1482) (explaining congressional judgment that "[d]enial of appeal when arbitration is given precedence should not often be costly: district courts usually will be correct, and the arbitration process is apt to produce considerable savings in the process of preparing for trial if the dispute is ultimately found nonarbitrable. [But] if the dispute is found arbitrable, of course, great saving will be made [by having allowed immediate appeal]"); David D. Siegel, *Appeals from Arbitrability Determinations*, Practice Commentary to 9 U.S.C. § 16, 9 U.S.C.A. § 16 at 495 (West 1999) (describing Section 16 of the FAA as "a pro-arbitration statute designed to prevent the appellate aspect of the litigation process from impeding the expeditious disposition of an arbitration.").

2. The Ninth Circuit reached the contrary conclusion in *Britton*, holding that an appeal of "arbitrability" does not "divest[] [the district court] of jurisdiction to proceed with the case on the merits." *Britton*, 916 F.2d at 1412. That position has been explicitly rejected by the Seventh and Eleventh Circuits. *Blinco*, 366 F.3d at 1252 ("We are unpersuaded by the * * * reasons articulated by the Ninth Circuit"); *Bradford-Scott*, 128 F.3d at 505 (*Britton*'s analysis does not "persuade[]").

In this case, the Second Circuit recognized that "the circuits are divided on this question." Pet. App. 25a. But it sided with the Ninth Circuit, "explicitly adopt[ing] the Ninth Circuit's position that further district court proceedings in a case are not 'involved in' the appeal of an order refusing arbitration, and that a district court therefore has jurisdiction to proceed with a case absent a stay from this Court." Pet. App. 25a-26a.

The Second Circuit's suggestion (Pet. App. 25a) that the Seventh and Eleventh Circuits' decisions in *Bradford-Scott* and *Blinco* are different because they "granted a stay of the district court proceedings pending appeal"—and did not have the effect of "undoing a trial because the district court lacked jurisdiction to proceed after an appeal from an order denying arbitration"—is without merit. Whether a district court has jurisdiction to conduct proceedings while an appeal of an order denying arbitrability cannot turn on how quickly the district court is able to conclude such a trial. Neither the Seventh nor the Eleventh Circuits suggested that a district court has any discretion to continue with proceedings or trial during a non-frivolous appeal. Both invoked *Griggs* for the proposition that a notice of appeal has "jurisdictional significance" and ordinarily "divests" the district court of authority to proceed with matters involved on appeal. *Bradford-Scott*, 128 F.3d at 505; *Blinco*, 366 F.3d at 1251. For that reason, in *Bombardier*, the D.C. Circuit *denied* a motion for a stay "as unnecessary" because

the filing of a non-frivolous appeal by itself "divests the district court of jurisdiction" and prevents the district court from proceeding "until the appeal is resolved." 2002 WL 31818924, at *1. In other words, the jurisdictional framework established by Section 16(a) of the FAA gave petitioners the right to have their non-frivolous arbitrability question decided on appeal *before* the district court conducted a trial. Cf. *Grupo Dataflux* v. *Atlas Global Group, L.P.*, 124 S. Ct. 1920 (2004). Particularly in view of the staggering liability at stake in this case, petitioners were entitled to insist that any trial occur only when the district court had jurisdiction and authority over the claims.[4]

This case is the proper vehicle for resolving the deepening conflict and resulting confusion among the lower courts. Indeed, this case comes to this Court in precisely the posture necessary to present the question—*i.e.*, where the court of appeals concluded that the district court could conduct proceedings pending appeal and then erroneously held that the matter was not arbitrable. Had the lower court properly resolved the second question in petitioners'

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[4] Reflecting the conflict among the courts of appeal, the district courts are in disarray on this issue. Even after conducting its (one-sided) trial during the pendency of the appeal, the district court in this case acknowledged as much. Pet. App. 59a. So too have other district courts. Compare *Cambio Health Solutions, LLC* v. *Reardon*, 228 F. Supp. 2d 883, 885-886 (M.D. Tenn. 2002) (holding that it had no jurisdiction to conduct proceedings pending appeal), with *Hill* v. *PeopleSoft USA, Inc.*, 341 F. Supp. 2d 559 (D. Md. 2004) (allowing discovery during the appeal but refusing to conduct actual proceedings on the merits); *Bailey* v. *Ameriquest Mortg. Co.*, No. CIV. 01-545 JRT/FLN, 2002 WL 1835642 (D. Minn. Aug 5, 2002) (recognizing that "a circuit split currently exists as to whether, and to what extent, a notice of appeal under § 16(a) of the FAA divests the district court of jurisdiction over proceedings in the case" but allowing non-merits discovery); and *In re Startec Global Communications Corp.*, 303 B.R. 605, 607-608 (D. Md. 2004) ("[W]hile the issue is obviously not free from doubt, it appears that a stay is not automatically effected whenever an appeal is taken.").

favor, see *infra*, the question of the district court's authority to conduct proceedings during the pendency of the appeal could not have been presented at all. In that circumstance, the court of appeals would have vacated the district court's "trial" decision and remanded for arbitration proceedings, thereby preventing petitioner from seeking review of the jurisdictional question.

B. The Issue Is Important

As the expanding circuit conflict itself attests, this issue is both recurring and important. Arbitration clauses are increasingly common in commercial agreements. Recent reports indicate that, over the last ten years, the number of domestic arbitrations has nearly quadrupled. See American Arbitration Association, *Dispute Resolution Times*, Sept.-Nov. 2003, at 1, 15. The popularity of arbitration as a dispute resolution mechanism in international transactions is growing at an equally impressive pace. Gary B. Born, International Commercial Arbitration: Commentary and Materials 7 (Kluwer 2001). As arbitration clauses have grown more popular, so too has the importance of predictable and uniform federal rules governing their enforcement.

The circuit conflict creates costly uncertainty. In case after case, the scope of a party's rights under agreements of national or even international scope—whether a party seeking to enforce an arbitration agreement may be subject to the burden of trial pending appeal—now depends on the happenstance of geography. The risk of forum shopping, moreover, is acute given that venue often will be proper in various jurisdictions. In this case, for example, during petitioners' appeal from the denial of their motion to compel arbitration, respondents' *Illinois* fraud claims were tried to conclusion in the district court in New York. By contrast, if those same Illinois state-law claims had been brought in a district court in Illinois, the Seventh Circuit's *Bradford-Scott* opinion would have precluded that trial.

Moreover, it is important that this Court reject the reasoning of the Second and Ninth Circuits. The decision to allow cases to proceed to trial while the propriety of judicial proceedings is on appeal destroys the very right that arbitration clauses are supposed to preserve—and with it the incentive to arbitrate that Congress intended to create in the FAA. "The arbitrability of a dispute * * * gives the party moving to enforce an arbitration provision a right not to litigate the dispute in a court and bear the associated burdens." *Blinco*, 366 F.3d at 1252. Congress's provision for immediate interlocutory appeal under Section 16(a)(1)(A) protects that right. *Ibid.*; cf. *Mitchell* v. *Forsythe*, 472 U.S. 511, 526 (1985) (interlocutory appeals of denials of qualified immunity are available because the immunity is "an *immunity from suit* rather than a mere defense to liability" and is "effectively lost if a case is erroneously permitted to go to trial").

If the case proceeds while that appeal is pending, however, that right "not to litigate the dispute in court and bear the associated burdens" is irretrievably lost. *Blinco*, 366 F.3d at 1252. The fact that two circuits encompassing many of the Nation's major commercial centers have adopted a rule that permits that result underscores the need for further review. Those holdings gravely undermine one of the principle incentives—the ability to avoid expansive trial court proceedings in favor of the chosen arbitrable forum—for the inclusion of arbitration clauses.

The Second and Ninth Circuits' view appears largely to be motivated by the concern that litigants will attempt to "stall a trial simply by bringing a frivolous motion to compel arbitration." *Britton*, 916 F.2d at 1412. That concern is misplaced, however, because only a *non-frivolous* appeal divests trial courts of jurisdiction. See *Bradford-Scott*, 128 F.3d at 506; *Blinco*, 366 F.3d at 1251; cf. *Steel Co.* v. *Citizens for a Better Env't*, 523 U.S. 83, 89 (1998) (recognizing that an arguable claim is sufficient to vest

jurisdiction but a frivolous one is not). In this case, the court of appeals agreed that the appeal was not frivolous. Pet. App. 23a; see also *id.* at 54a (stay of execution proper because "it appears likely that the district court improperly denied the motion to compel arbitration"). Besides, as this Court has explained, "problems of delay" caused by defendants who "engage in dilatory appeals * * * can be obviated by rules or policies giving such appeals expedited treatment." *Abney* v. *United States*, 431 U.S. 651, 662 n.8 (1977); *Blinco*, 366 F.3d at 1252 ("[U]pon motion, a court of appeals * * * can either dismiss the appeal as frivolous or affirm summarily the denial of the motion to compel arbitration.").

Finally, the approach adopted by the Second and Ninth Circuits cannot be reconciled with sound principles of judicial administration. If district courts are permitted to proceed to trial at their discretion despite a pending appeal under the FAA, parties regularly will find it necessary to seek emergency relief from the courts of appeals—and failing relief there, from this Court—to protect their substantive right not to be haled into court. Indeed, in this case, petitioners sought a stay from the Second Circuit and repeatedly renewed that request when the Second Circuit failed to act. Requiring the filing of such stay motions routinely, and attaching dire consequences to the inadvertent failure to act on them, cannot be squared with the interests of fairness, uniformity or judicial economy.

II. Whether Arbitrability Of A Dispute Should Be Determined By The Law Selected In A General Choice-Of-Law Clause Is An Important Question On Which The Courts Of Appeals Are Divided

A. The Courts Of Appeals Are In Conflict Over The Role Of A General Choice-Of-Law Clause In Deciding Arbitrability Questions

The courts of appeals are likewise divided on whether the law selected through a general choice-of-law clause,

rather than federal rules developed under the FAA, should determine whether a particular claim is subject to arbitration. In this case, the relevant contracts included a choice-of-law provision specifying the application of Swiss law. Invoking that provision, the Second Circuit held that Swiss law governs whether non-signatories could assert the right to arbitration.[5] That holding, although consistent with the D.C. Circuit's decision in *Ekstrom* v. *Value Health, Inc.*, 68 F.3d 1391, 1393 (D.C. Cir. 1995), squarely conflicts with *Roadway*, 257 F.3d at 297; *Porter Hayden*, 136 F.3d at 382; *Wolsey*, 144 F.3d at 1211; and *Ferro Corp.*, 142 F.3d at 938. Those courts recognize that, under *Mastrobuono* v. *Shearson Lehman Hutton, Inc.*, 514 U.S. 52 (1995), federal law (and the FAA in particular) governs issues of arbitrability, notwithstanding a choice-of-clause, unless the parties make their intent to displace federal law clear.

This Court has developed a body of federal "substantive law of arbitrability" under the FAA to assist in construing the scope of arbitration agreements. *Moses H. Cone*, 460 U.S. at 24. For example, as a matter of federal law, this Court "has made clear" that "whether the parties have submitted a particular dispute to arbitration, *i.e.*, the 'question of arbitrability,' is 'an issue for judicial determination [u]nless the parties clearly and unmistakably provide otherwise.'" See *Howsham* v. *Dean Witter Reynolds, Inc.*, 537 U.S. 79, 83 (2002) (quoting *AT&T Tech. Inc.* v. *Communications Workers of Am.*, 475 U.S. 643, 649 (1986)); see also *First Options of Chicago, Inc.* v. *Kaplan*, 514 U.S.

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[5] The court of appeals did not dispute that, if federal (as opposed to Swiss law) governed, "employees or disclosed agents of an entity that is a party to an arbitration agreement" such as petitioners would be "protected by that agreement." *Campaniello*, 117 F.3d at 668; see also *Contec Corp.* v. *Remote Solution Co.*, 398 F.3d 205 (2d Cir. 2005); *Long* v. *Silver*, 248 F.3d 309, 316 n.4 (4th Cir. 2001); *Smith/Enron*, 198 F.3d at 96.

938, 943 (1995).[6] Likewise, as a matter of federal law, this Court has established that ambiguities concerning the scope of the parties' intention under an otherwise valid arbitration agreement must be resolved "in favor of arbitration." *Green Tree*, 539 U.S. at 451-452; *Moses H. Cone*, 460 U.S. at 25-26; *Mitsubishi Motors*, 473 U.S. at 626.[7]

This Court has consistently applied *federal* substantive law to determine whether parties have agreed to arbitrate a particular dispute. *Mastrobuono*, 514 U.S. at 64; *Mitsubishi Motors*, 473 U.S. at 626; see also *Shearson/American Express, Inc.* v. *McMahon*, 482 U.S. 220, 226 (1987); *Dean Witter Reynolds, Inc.* v. *Byrd*, 470 U.S. 213, 221 (1985). *Mastrobuono*, for example, rejected an effort to invoke a choice-of-law provision to incorporate "special rules" of non-FAA law so as to "limit[] the authority of arbitrators." 514 U.S. at 64. Instead, the Court ruled that the choice-of-law provision should be read to incorporate only "substantive principles" so that it would govern "the rights and duties of the parties, while the arbitration clause" under federal law "covers arbitration." *Id.* at 64.

Six years before deciding *Mastrobuono*, however, this Court decided *Volt Info. Sciences, Inc.* v. *Board of Trustees of Leland Stanford Junior Univ.*, 489 U.S. 468 (1989). In *Volt*, the Court accepted a California court's holding, based on California law, that a general choice-of-law clause electing California law evidenced the parties' intent to be

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[6] The Court has explained this default rule on the grounds that "contracting parties would likely have expected a court" to decide the scope of arbitration agreements. *Howsham*, 537 U.S. at 83.

[7] Although this Court has not expressly addressed the issue, the courts of appeals have held that the federal law to be applied when the *existence* of an agreement to arbitrate is at issue "comprises generally accepted principles of contract law." See, *e.g.*, *Genesco, Inc.* v. *T. Kakuichi & Co., Ltd.*, 815 F.2d 840, 844 (2d Cir. 1987); see also *Bell* v. *Cendant Corp.*, 293 F.3d 563, 566 (2d Cir. 2002).

governed by California's arbitration rules rather than the FAA. *Volt*, 489 U.S. at 479.

Against that background, the courts of appeals have struggled to determine the circumstances under which a general choice-of-law provision is sufficient to displace federal law when determining the arbitrability of a particular dispute. Relying on *Mastrobuono*, a majority of the courts have concluded that, absent a specific provision to the contrary, federal law governs the issue of arbitrability, notwithstanding a choice-of-law clause. *Roadway*, 257 F.3d at 297 ("[A] generic choice-of-law clause, standing alone, raises no inference that contracting parties intended to opt-out of the FAA's default regime."); *Porter Hayden*, 136 F.3d at 382 ("[T]he Supreme Court has * * * squarely rejected the argument that a federal court should read a contract's general choice-of-law provision as invoking state law of arbitrability and displacing federal arbitration law."); see also *Action Indus., Inc.* v. *United States Fidelity & Guaranty Co.*, 358 F.3d 337, 341 (5th Cir. 2004) ("The Supreme Court held [in *Mastrobuono*] that a contract's choice-of-law provision did not evince the parties' clear intent to opt out of the FAA default rules."); *Wolsey, Ltd.*, 144 F.3d at 1211 (applying *Mastrobuono*); *Ferro*, 142 F.3d at 938 (applying choice-of-law clauses "to foreclose the application of the substantive law enacted by Congress in the FAA" would leave the FAA "applicable in very few cases.").

The Second and D.C. Circuits have read *Volt* expansively and reached the contrary result. See *Ekstrom*, 68 F.3d at 1393 (following *Volt* to hold that a general choice-of-law clause electing Connecticut law incorporates Connecticut's 30-day limitations period instead of the FAA's more generous 90-day limit); *TIG Ins. Co.* v. *Security Ins. Co. of Hartford*, 360 F.3d 322 (2d Cir.) (following *Volt* to hold that California's arbitral rules are incorporated by a choice-of-law clause selecting California

law), cert. denied, 125 S. Ct. 90 (2004). In this case, the Second Circuit expanded *Volt* even further to hold that a choice-of-law clause electing Swiss law governs arbitrability determinations. Pet. App. 19a (relying on *Volt*). Unlike the other Circuits, the D.C. and Second Circuits thus have declined to "join the long line of cases distinguishing *Volt*" or limiting "its applicability to cases with a similar procedural posture," *i.e.*, cases requiring "deferential" review of a state's construction of its own contract principles. *Ferro Corp.*, 142 F.3d at 936.

B. The Issue Requires Resolution By This Court

The inconsistent rulings of the courts of appeals themselves create great uncertainty over the scope of arbitration agreements, generating the sort of wasteful litigation that the choice of an arbitral forum is designed to avoid. The rule selected by the Second Circuit heightens that uncertainty in international commercial contracts because it replaces the uniform federal law of arbitrability with the myriad rules of different arbitral fora. It requires federal courts to discern and apply what will often be hopelessly uncertain principles of *foreign law*. In this case, for example, the court of appeals requested the parties to submit, on an expedited basis, expert affidavits on the scope of arbitrability under Swiss law. There is no clear authority on this issue and the only way to be certain of the correct answer is to submit the issue to an arbitral panel in Switzerland.

The Second Circuit's approach also creates serious anomalies. In this case, for example, the Second Circuit applied Swiss law to determine some arbitration issues, and the FAA to determine others, yielding a result that the parties could not have anticipated in shaping their agreements. Most surprisingly, it imposed massive civil liability *under substantive American law* in a judicial proceeding on parties who would, under American law, clearly have a right

to present their defenses to an arbitration panel and avoid proceeding in court. See p. 22 n.5, *supra*.

Moreover, outside the United States, the principle of "competence-competence" ordinarily vests the *arbitral forum* with authority to determine the scope of the arbitration agreement in the first instance. See *China Minmetals Materials Import and Export Co., Ltd.* v. *Chi Mei Corp.*, 334 F.3d 274, 287 (3d Cir. 2003) (explaining that "international arbitration rules tend to favor the rule of competence-competence * * * the principle that gives arbitrators the power to decide their own jurisdiction—more than American arbitration rules."); Born, *supra*, at 456 n.90 ("many nations permit parties to agree to vest arbitration tribunals with the jurisdiction to determine their own jurisdiction. The tribunal's decision will be subject, depending on national law, to either interlocutory or eventual judicial review of the tribunal's award."). Here, for example, Article 7 of the Swiss Private International Law Statute of Dec. 18, 1987, specifies that arbitrators, as opposed to courts, must decide questions of arbitrability in the first instance unless the arbitration agreement in question is alleged to be void or inoperative. Pet. App. 300a.[8] Notwithstanding those rules, the court of appeals interpreted the choice-of-law clause to require Swiss law to govern arbitrability, but United States law to govern who—courts or the Swiss arbitrators—should decide the issue of arbitrability under Swiss law. It is implausible to imagine that the parties intended the choice-of-law clause to be applied in such a highly selective manner. Given the im-

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[8] Petitioners informed the Second Circuit that "defenses to arbitrability based on Swiss law are for the arbitrators, and not for this [c]ourt, to decide," Pet. Suppl. Br. 19 (July 14, 2004), and that "Swiss law vests the arbitral tribunal with authority to determine its own jurisdiction," *id.* at 24. See also Pet. C.A. Reply Br. 12 n.5 ("At the very least, the question [of arbitrability] should have been referred to the Swiss tribunal in the first instance.")

portance of arbitration in international agreements and the square conflict as to the effect of a choice-of-law provision on arbitrability determinations, this issues cries out for the Court's review.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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MARCH 16, 2005

APPENDICES

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Docket Nos. 03-7792(L), 03-7794(CON),
03-7796(CON), 03-7878(XAP)

MOTOROLA CREDIT CORPORATION AND NOKIA CORPORATION, PLAINTIFFS-APPELLEES-CROSS-APPELLANTS

v.

KEMAL UZAN, CEM CENGIZ UZAN, MURAT HAKAN UZAN, MELAHAT UZAN, AYSEGUL AKAY, ANTONIO LUNA BETANCOURT, UNIKOM ILETISM HIZMETLERI PAZARLAMA A.S., STANDART PAZARLAMA A.S., AND STANDART TELEKOMUNIKASYON BILGISAYAR HIZMETLERI A.S., DEFENDANTS-APPELLANTS-CROSS-APPELLEES

Argued: June 23, 2004
Decided: Oct. 22, 2004

Before: MINER, CALABRESI, and CABRANES, Circuit Judges.

JOSE A. CABRANES, Circuit Judge:

This is an appeal brought by individual and corporate defendants who, the District Court found, swindled two

large corporations out of well over $2 billion.[1] On appeal, defendants contend that the District Court lacked jurisdiction over this case and the parties to it on multiple grounds. They argue first that the District Court erred in denying their motion to compel arbitration. In the alternative, and assuming the case was not arbitrable, they claim that the District Court lacked jurisdiction to conduct a trial while an appeal was pending in this Court from the District Court's denial of their motion to compel arbitration; that the District Court abused its discretion by deciding unsettled questions of Illinois law after all the federal claims were dismissed; and that the Illinois claims brought by plaintiffs were not ripe for adjudication. Most defendants also claim that the District Court lacked personal jurisdiction over them.

Defendants also challenge some of the remedies imposed by the District Court after a trial in which they did not participate. Plaintiffs, in turn, cross-appeal on one issue, arguing that the District Court abused its discretion when it denied their motion to reinstate RICO claims that were previously dismissed at the behest of this Court.

For the reasons stated below, we reject each of defendants' challenges to the District Court's jurisdiction over this action, and we dismiss the cross-appeal as meritless. However, we vacate the judgment of the District Court to the extent that it (a) imposed a constructive trust, for the benefit of Motorola Credit Corporation, over 66% of the stock of a company controlled by defendants; (b) permitted plaintiffs to enforce their judgment against 130 nonparties to this litigation; and (c) awarded punitive damages to Motorola Credit Corporation in the amount of $2,132,896,905.66. Having vacated the first two remedies on

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[1] Plaintiffs have brought a motion to dismiss this appeal under the fugitive disentitlement doctrine. By an order filed the same day as this opinion, we have denied this motion.

the principal ground that the District Court did not make sufficiently specific findings to support them, we remand for proceedings consistent with this opinion. We also direct the District Court to reconsider its punitive damage award, which was inconsistent with due process requirements of the Constitution and Illinois law.

I. FACTUAL BACKGROUND

The following facts are drawn principally from our Court's previous opinion in this case, *Motorola Credit Corp.* v. *Uzan*, 322 F.3d 130 (2d Cir. 2003) ("*Uzan I*"), and from the District Court's opinion, *Motorola Credit Corp.* v. *Uzan*, 274 F. Supp. 2d 481 (S.D.N.Y. 2003) ("*Uzan II*"). Plaintiff Motorola Credit Corporation ("Motorola") is the financing affiliate of Motorola, Inc., which manufactures and services cellular telecommunications systems. Plaintiff Nokia Corporation ("Nokia") is another major telecommunications manufacturer. The individual defendants are members and a close associate of the Uzan family of Turkey, which controls, *inter alia*, companies called Telsim and Rumeli Telefon. Neither Telsim nor Rumeli Telefon is a party to this action. The Uzans also control companies called Standart Telekomunikasyon Bilgisayar Hizmetleri A.S. ("Standart Telekom"), Unikom Iletism Hizmetleri Pazarlama A.S., and Standart Pazarlama A.S. These companies are defendants in this action.

In 1998, Motorola lent Telsim $360 million to purchase cellular infrastructure and equipment from Motorola Ltd. (a separate entity), and $200 million to enable Telsim to acquire a 25-year nationwide cellular license for Turkey. As collateral, Rumeli Telefon—which then owned approximately 73.5% of Telsim—pledged 51% of Telsim's outstanding shares. In subsequent years, Motorola provided significant additional financing eventually totaling approximately $2 billion and the collateral pledged by Rumeli Telefon as security for the loan was increased to

66% of Telsim's outstanding shares. Each of Motorola's relevant agreements (the "Motorola Agreements") provides that it "shall be governed by and interpreted in accordance with the internal laws (without regard to the laws of conflicts) of Switzerland," and that the parties agree to arbitrate any dispute that "arises hereunder, or under any document or agreement delivered in connection herewith," before a three-person arbitration panel in Switzerland in accordance with the International Arbitration Rules of the Zurich Chamber of Commerce. *Uzan II*, 274 F. Supp. 2d at 507.

Also in 1998, Nokia entered into a smaller but similar arrangement with Telsim and Rumeli Telefon. The initial loan was extended by ABN-AMRO Bank N.V., on behalf of Nokia and backed by the credit of Nokia. As security, Rumeli Telefon pledged 5% of Telsim's outstanding shares. In subsequent years, Nokia extended additional financing to Telsim, approximately $800 million in all, and Rumeli Telefon increased the pledged interest to 7.5% of Telsim's outstanding shares. Each of the relevant agreements (the "Nokia Agreements") provides that it "shall be governed by, and shall be construed in accordance with Swiss law," *Uzan I*, 322 F.3d at 133, and that the parties agree to arbitrate all disputes "arising between the Parties out of or in connection with this Agreement" before a three-member arbitration panel in Switzerland in accordance with the International Arbitration Rules of the Zurich Chamber of Commerce, *Uzan II*, 274 F. Supp. 2d at 508. Of these loans from Motorola and Nokia, Telsim has repaid approximately $200 million since 1998, and only $5 million since mid-2000.

The District Court found that the defendants made numerous false statements of fact designed to induce Motorola and Nokia to extend the loans at issue in this case. These false statements included, *inter alia*, "material false statements regarding the business practices and finances of Telsim, the value and security of the collateral, the uses to

which prior loan proceeds had been put, the status of other financing for Telsim, the existence and value of offers to purchase part or all of Telsim, and the status of negotiations with third parties" to sell control of Telsim. *Id.* at 577.

The District Court also found that, at a special shareholders meeting of Telsim convened on April 24, 2001, the defendants substantially diluted the value of the collateral pledged to Motorola and Nokia. At the meeting, the shareholders tripled the number of outstanding Telsim shares. Although current shareholders were afforded preemption rights to purchase the newly issued shares, Rumeli Telefon (the largest shareholder) waived these rights. The Telsim shareholders then transferred Rumeli Telefon's waived preemption rights to defendant Standart Telekom (another Uzan-controlled company), which exercised those rights. As a result of this transfer, Standart Telekom raised its stake in Telsim from 0.32% to 66.48%, while Rumeli Telefon's holding (all of which had been pledged to Motorola and Nokia) was reduced from 73.63% to 24.54%.

On January 4, 2002, the Uzans staged another meeting of Telsim shareholders. At that meeting, the defendants passed a resolution that created privileged "Class A" shares, held by the Uzans, that were unencumbered by any pledge to Motorola or Nokia, and that gave Class A shareholders the authority to elect four of Telsim's five directors. Under Turkish law, these changes became effective when the resolution was duly registered in May 2002.

The District Court found that, in addition to diluting and destroying the plaintiffs' collateral, defendants filed false criminal charges against plaintiffs' senior executives, claiming that the executives engaged in "explicit and armed threat[s] to kill," blackmail, and kidnap members of the Uzan family. These charges were later dismissed by the

Turkish criminal court on the ground that they lacked a factual basis.

The District Court's extensive findings are laid out in its meticulous 173-page opinion granting a judgment to Motorola and Nokia totaling more than $4 billion. For the purposes of this appeal, however, these detailed findings are for the most part irrelevant because the appeal is based principally on challenges to the District Court's jurisdiction over these actions.

II. PROCEDURAL HISTORY

A. *Proceedings Before Final Judgment*

In their complaint filed in January 2002, Motorola and Nokia alleged violations of RICO (Counts I-IV), Illinois state law (Counts V-VII, XI), the Computer Fraud and Abuse Act, 18 U.S.C. § 1030(a)(4) (Count VIII), and the Electronic Communications Privacy Act, 18 U.S.C. §§ 2511(1)(a), 2701(a)(2) (Counts IX-X). Motorola and Nokia also asked the District Court to impose a constructive trust over the stake in Telsim improperly acquired by Standart Telekom. In March 2002, defendants moved to dismiss the complaint and to compel arbitration. Plaintiffs, in turn, sought preliminary injunctive relief including, *inter alia*, the attachment of certain New York properties and the deposit in the District Court's registry of the Telsim shares pledged as collateral.

On or about April 19, 2002, while the District Court was considering plaintiffs' request for a preliminary injunction, the defendants obtained three injunctions from Turkish courts. These injunctions purported to prohibit the transfer of Telsim stock outside Turkey.

On May 9, 2002, following a six-day evidentiary hearing, the District Court granted plaintiffs' motion for a preliminary injunction, which directed the defendants "to deposit into the [District Court's] registry . . . the shares of stock of Telsim . . . held by defendant Standart [Telekom]

. . . and issued to Standart [Telekom] during a meeting of Telsim shareholders on April 24, 2001, comprising at least 73.5% of the shares of Telsim stock currently outstanding." The injunction also prohibited defendants from further diluting the pledged collateral. In violation of the injunction, defendants, who had claimed that the case should proceed in arbitration, did not deposit the requisite Telsim shares in the registry of the District Court. Indeed, the very day after the injunction was entered, defendants, in further contravention of the District Court's order, cancelled the voting rights of the plaintiffs' collateral.[2]

On May 21, 2002, the District Court issued an opinion stating its reasons for entering a preliminary injunction. *Motorola Credit Corp.* v. *Uzan*, 202 F. Supp. 2d 239 (S.D.N.Y. 2002). In that opinion, the District Court concluded, *inter alia*, that "the arbitration provisions of the Telsim contracts are a total irrelevancy" because the individual defendants, rather than Telsim, were the real parties in interest in this action. *Id.* at 251.

On May 22, 2002, defendants appealed the District Court's preliminary injunction. The appeal was assigned docket number 02-7566 in this Court, and our Court set an expedited briefing schedule. However, proceedings in the District Court were not stayed pending resolution of the appeal, and the District Court moved the case forward at a brisk pace. On August 22, 2002, the District Court held defendants in civil contempt and imposed a $31,000 fine on

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[2] At around the same time as the defendants were defying Judge Rakoff's orders, they were also defying the orders of foreign courts. In 2002, Motorola successfully moved the English High Court of Justice for "freezing orders" prohibiting members of the Uzan family from disposing of assets worldwide. When the Uzans failed to comply, the Court found Hakan and Kemal Uzan in contempt and ordered them arrested and imprisoned if found within the Court's jurisdiction.

them. On September 30, 2002, the District Court (1) formally denied defendants' motion to compel arbitration, having already stated that the arbitration provisions at issue were not relevant or applicable; and (2) enjoined the defendants from pursuing pending Swiss arbitrations involving Telsim and Motorola.[3] On October 15, 2002, the District Court filed a Memorandum Order setting out more fully the bases for its September 30 Order.[4] The District Court then refused to stay its proceedings pending appeal of the denial of arbitration, reasoning that "none of the moving defendants is a party to the arbitrations in question" and, therefore, "the appeal is frivolous." *See Motorola Credit Corp.* v. *Uzan*, No. 02 CIV 666, 2002 WL 31426202, at *1 (S.D.N.Y. Oct. 29, 2002). On October 30, 2002, defendants appealed from the District Court's September 30 Order and October 15 Memorandum Order, and their appeal was assigned docket number 02-9302 in this Court.

On November 27, 2002, a Turkish court issued yet another injunction, this one purporting to enjoin plaintiffs and the District Court itself from proceeding. On January 6, 2003, the District Court enjoined defendants from

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[3] In February 2002, Telsim initiated an arbitration against Motorola in the Zurich Chamber of Commerce. Telsim acknowledged its debt, but claimed that under Swiss law, "economic force majeure" resulting from disruptions in the Turkish economy excused its failure to pay. The arbitration has been actively litigated since March 18, 2003. In January 2004, Motorola was granted a final partial award of $85 million against Telsim. This amount has not been paid. A trial on all issues is scheduled for December 2004.

[4] In a separate order dated October 15, 2002, the District Court announced that if defendants did not comply with the preliminary injunction by November 26, 2002, the contempt sanction would increase to $100 million for the month of November and would double each month thereafter. On November 27, 2002, this Court, in docket number 02-7566, stayed this order.

proceeding with the Turkish action and ordered them to take all steps necessary to dissolve the Turkish injunctions. On January 17, 2003, defendants arranged for 36 Telsim employees to obtain yet another injunction from the Turkish court purporting to stay all proceedings against the Uzans worldwide. Both the November 27, 2002 injunction and the January 17, 2003 injunction have since been lifted by Turkish courts.

Beginning February 10, 2003 and continuing through February 19, 2003, the District Court conducted a bench trial on the merits of plaintiffs' claims, while the appeals in docket numbers 02-7566 and 02-9302 were pending in our Court. Prior to trial, defendants issued several subpoenas and served document requests, and obtained more than 96,000 pages of documents from Motorola and Nokia. At the same time, however, defendants refused to appear for depositions, in violation of multiple court orders. Moreover, shortly before the trial began, defendants informed the District Court that, because it lacked jurisdiction over the actions ever since the notice of appeal from the September 30, 2002 order was filed, they would not appear, present evidence, or examine witnesses at trial.

On March 7, 2003, in *Uzan I*, a unanimous opinion, we consolidated the cases bearing docket numbers 02-7566 and 02-9302, and left intact the preliminary injunction entered by the District Court. *See Motorola Credit Corp.* v. *Uzan*, 322 F.3d 130, 137 (2d Cir. 2003). However, we also concluded that, under *First Nationwide Bank* v. *Gelt Funding Corp.*, 27 F.3d 763, 768 (2d Cir. 1994), plaintiffs lacked statutory standing to bring their RICO claims because those claims were unripe. *Uzan I*, 322 F.3d at 135. In *First Nationwide*, our Court explained that "a cause of action does not accrue under RICO until the amount of damages becomes clear and definite," *First Nationwide*, 27 F.3d at 768, and, furthermore, that the "clear and definite" amount of damages suffered by a secured creditor who is

fraudulently induced to make a loan "cannot be established until it is finally determined whether the collateral is insufficient to make the plaintiff whole, and if so, by how much." *Id.* Although we acknowledged in *Uzan I* that the corporate borrower (Telsim) is not a defendant in the present case, we concluded that, just as a creditor's RICO claims against a borrower would be abated to the extent that the creditor successfully foreclosed on collateral, so too would Motorola and Nokia's claims against the Uzans and the corporate defendants they control. *See Uzan I*, 322 F.3d at 136. Accordingly, we directed the District Court to dismiss the RICO claims for lack of statutory standing, and remanded the case to the District Court to revisit the question of whether to exercise supplemental jurisdiction over the lenders' remaining claims.

B. *Final Judgment*

On July 31, 2003, after additional briefing relating to our Court's decision in *Uzan I*, the District Court filed a 173-page Opinion and Order addressing numerous jurisdictional issues as well as the merits of the plaintiffs' claims.

With respect to jurisdiction, the District Court granted the plaintiffs' motion requesting that the Court retain supplemental jurisdiction over the Illinois fraud claims. The Court also concluded that, in contrast to the RICO claims, the claims under Illinois law alleging common law fraud and civil conspiracy were ripe for adjudication. Finally, the Court concluded that it did not have jurisdiction over Motorola's remaining federal claims (under the Computer Fraud and Abuse Act and the Electronic Communications Privacy Act) because Motorola Credit Corporation had not shown that it—rather than its corporate parent—was the injured party.

Having asserted jurisdiction over the state law claims after our decision that the RICO claims were unripe and its own decision that it had no jurisdiction over the remaining

federal claims in the complaint, the District Court proceeded to enter extensive findings of fact concerning the Uzans' conduct toward the plaintiffs. The key findings were that the defendants, in order to induce Motorola and Nokia to extend the loans at issue, made numerous false representations, including material false statements regarding the business practices and finances of Telsim, the value and security of the collateral, the status of other financing for Telsim, the existence and value of offers to purchase part or all of Telsim, and the status of negotiations with third parties. *See Uzan II*, 274 F. Supp. 2d at 511-74.

Based on its findings of fact, the District Court determined that (1) it had personal jurisdiction over the defendants; (2) the defendants had committed common law fraud, promissory fraud, and civil conspiracy under Illinois law; and (3) Motorola and Nokia were entitled to a constructive trust over the functional equivalent of 73.5% of Telsim—Motorola to around 66% of the company, and Nokia to the rest.

The District Court proceeded to award compensatory damages to Motorola equal to the full amount of its loans to defendants plus prejudgment interest ($2,132,896,905.66), as well as punitive damages to Motorola equal to the same amount ($2,132,896,905.66). Pursuant to its imposition of liability based on plaintiffs' constructive trust claim, the Court also granted both Motorola and Nokia equitable ownership of Telsim shares that are the functional equivalent of the original collateral, and ordered defendants to convey those shares to the registry of the Court. Notably, the Court determined also that plaintiffs could collect their judgments from *any* of the more than 130 corporate entities that it found were controlled by the

Uzans, despite the fact that those entities are not parties to this litigation.[5]

Finally, in its July 21, 2003 Opinion and Order, the District Court entered several additional contempt sanctions. First, it provided that, since Nokia's only meaningful remedy was the constructive trust over the Telsim shares, if those shares were not handed over to the court registry within a week of the entry of judgment, another judgment would be entered in Nokia's favor requiring defendants to pay two times the outstanding loans to Nokia plus interest (for a total of $853,707,639.13). Second, because of their contempt of the Court's prior orders, Judge Rakoff ordered the individual defendants arrested if they entered the United States.

Final judgment was entered against defendants on August 1, 2003. On August 8, 2003, the District Court denied the defendants' motion for a stay of execution of the judgment. *Motorola Credit Corp.* v. *Uzan*, 275 F. Supp. 2d 519 (S.D.N.Y. 2003). However, the Court ruled that it would grant a stay conditioned on a partial bond of $1 billion. *See id.* at 524-25. Defendants did not, and have not to this day, put up the bond.

C. *Proceedings in this Court*

Within days of the entry of final judgment in the District Court, defendants filed notices of appeal in this Court, along with an emergency motion for a stay of execution and a motion to expedite the appeal. On Tuesday, August 15, 2003, Judge Cabranes, hearing the emergency motions,

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[5] The District Court also entered another wide-ranging injunction that, *inter alia*, (a) prohibited the defendants from diluting the collateral, (b) directed the defendants to take all necessary steps to dissolve Turkish injunctions "collusively procured" by defendants purporting to prohibit transfer of the collateral outside Turkey, and (c) prohibited the defendants from initiating any legal actions in foreign courts to interfere with the judgment.

issued an interim stay of execution until a motions panel could fully consider the motion for a stay at the beginning of this Court's August 2003 Term. Plaintiffs then filed a motion to dismiss the appeals pursuant to the fugitive disentitlement doctrine.

On September 26, 2003, a motions panel of this Court entered an order dismissing the individual defendants' appeal under the fugitive disentitlement doctrine, and denying as moot the individual defendants' motion for a stay. The motions panel also vacated the District Court's judgment against the corporate defendants, and remanded the case "so that the district court may determine whether the corporate defendants were alter-egos of individual defendants." On October 3, 2003, the individual defendants filed a petition for rehearing and rehearing in banc of the panel's September 26, 2003 order. They also withdrew their initial stay motion, and filed a new motion for a stay. On February 6, 2004, the motions panel issued an order denying both the motion for reconsideration and the motion for a stay.

On April 16, 2004, the motions panel entered an order (1) vacating the orders entered on September 26, 2003 and February 6, 2004, and directing that the matter be referred to a merits panel in the normal course; (2) referring the motion for a stay to the merits panel; and (3) reinstating the emergency stay entered in August 2003 "until the merits panel reaches a decision on the motion for a stay or on the merits." On May 7, 2004, the motions panel denied a motion brought by plaintiffs to vacate the stay, but granted their motion for an expedited appeal.[6]

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[6] Notably, while the appeal has been pending in this Court, plaintiffs claim that Turkish authorities have discovered that the Uzans used a family-controlled bank to perpetrate a $6 billion fraud on depositors, an amount equal to 3% of Turkey's gross national product. *See* Metin Munir, *Turkey $6bn Bank Fraud Claim,*

We heard oral argument on the merits on June 23, 2004. After receiving supplemental briefing from the parties addressing, *inter alia*, several questions of Swiss law that bear on the arbitration-related issues presented for our consideration, we entered an order on August 11, 2004 altering the stay of the judgment that had been in place since April 16, 2004. That order provided:

> The stay of the District Court's judgment in favor of Motorola Credit Corporation is hereby lifted, except insofar as the District Court (1) imposed a constructive trust over Telsim shares for Motorola's benefit, (2) awarded Motorola the sum of $2,132,896,905.66 in punitive damages, and (3) allowed Motorola to collect its judgment from parties other than the defendants. The stay of the District Court's judgment in favor of Nokia is hereby lifted, except insofar as the District Court allowed Nokia to collect from parties other than the defendants if the defendants do not transfer the requisite Telsim shares to the registry of the District Court.

Motorola Credit Corp. v. *Uzan*, No. 03-7792(L), Order of Aug. 11, 2004.

Having broadly recounted the almost Dickensian history of this case, we now turn to the merits of the individual and corporate defendants' appeals.[7]

Financial Times, Oct. 6, 2003, at 6. The Turkish government, the plaintiffs attest, has seized the Uzans' companies, including Telsim and the corporate defendants, and is pursuing their assets. Assuming this account is accurate, plaintiffs are now competing with the Turkish government for Uzan assets.

[7] We note that, even though the individual defendants' and the corporate defendants' interests are not self-evidently aligned in every respect—as reflected by the September 26, 2003 order of this Court dismissing the individual defendants' appeal but not that of the corporate defendants—they have jointly briefed all of the issues.

II. JURISDICTION

On appeal, defendants do not challenge the District Court's findings of fact, nor do they contest the legal conclusions regarding the substantive issues of liability that follow from those findings. Instead, they put forward an array of challenges to the District Court's jurisdiction over this case and the parties to it. Specifically, they argue that the District Court (a) erred in denying defendants' motion to compel arbitration; (b) lost jurisdiction to proceed after defendants filed a notice of appeal from the District Court's denial of their motion to compel arbitration; (c) abused its discretion when it exercised supplemental jurisdiction over exclusively non-federal claims based on considerations of efficiency and fairness to litigants; (d) erred when it concluded that plaintiffs' claims were ripe for adjudication under Illinois law; and (e) lacked personal jurisdiction over most of the various defendants. For the reasons stated below, we reject each of these arguments.

A. *Compelling Arbitration*

Defendants claim that the District Court erred in denying their motion to compel arbitration. Reviewing this claim *de novo*, *see Genesco, Inc.* v. *T. Kakiuchi & Co.*, 815 F.2d 840, 846 (2d Cir. 1987), we conclude that the District Court correctly held that defendants, who were not parties to any agreement to arbitrate with plaintiffs, could not compel plaintiffs to arbitrate.

Defendants sought to compel arbitration under 9 U.S.C. § 206, part of Chapter 2 of the Federal Arbitration Act ("FAA"), 9 U.S.C. § 201 *et seq.* Chapter 2 of the FAA, which implements the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, June 10, 1958, 21 U.S.T. 2517, 330 U.N.T.S. 3 (the "New York Convention"), applies to an arbitration agreement, like the Agreements at issue here, that is commercial and that is not "entirely between citizens of the United States." 9 U.S.C. § 202.

Section 206 provides that "[a] court having jurisdiction under this chapter may direct that arbitration be held in accordance with the agreement at any place therein provided for . . . ." 9 U.S.C. § 206. To determine whether to compel arbitration pursuant to Section 206, courts inquire "whether the parties agreed to arbitrate, and, if so, whether the scope of that agreement encompasses the asserted claims." *David L. Threlkeld & Co.* v. *Metallgesellschaft Ltd.*, 923 F.2d 245, 249 (2d Cir. 1991).

In this case, the parties did not agree to arbitrate. Defendants invoke the arbitration clauses in the Motorola Agreements and the Nokia Agreements, to which Telsim and Rumeli—but not any of the defendants—were signatories. Defendants seek to compel arbitration under two theories. First, they contend that the doctrine of estoppel prevents plaintiffs from resisting arbitration. *See, e.g.*, *Choctaw Generation Ltd. P'ship* v. *Am. Home Assurance Co.*, 271 F.3d 403, 404 (2d Cir. 2001) (holding that a signatory to an arbitration agreement was "estopped from avoiding arbitration with a non-signatory 'when the issues the nonsignatory is seeking to resolve in arbitration are intertwined with the agreement that the estopped party has signed'" (quoting *Smith/Enron Cogeneration Ltd. P'ship* v. *Smith Cogeneration Int'l, Inc.*, 198 F.3d 88, 98 (2d Cir. 1999))). Second, they argue that a party that signs an arbitration agreement with a corporation is also bound to arbitrate with that corporation's agents. *See Campaniello Imports, Ltd.* v. *Saporiti Italia, S.p.A.*, 117 F.3d 655, 668 (2d Cir. 1997) ("'Courts in this and other circuits consistently have held that employees or disclosed agents of an entity that is a party to an arbitration agreement are protected by that agreement.'" (quoting *Roby* v. *Corp. of Lloyd's*, 996 F.2d 1353, 1360 (2d Cir. 1993))).

Defendants did not raise in the District Court their second argument, based on *Campaniello Imports*, and so that Court only addressed their estoppel argument. The

Court held that estoppel did not apply here because "the very allegations of the Complaint, let alone the overwhelming evidence now adduced in their support show that this is not a case of trying to plead-around an agreement to arbitrate but rather of directly suing the real culprits, the Uzans, who simply used Telsim as a front to commit the instant fraud." *Uzan II*, 274 F. Supp. 2d at 505. The Court also held that estoppel, an equitable doctrine, was unavailable to defendants based on their misconduct both prior to and during the litigation, which left them with unclean hands. *See id.* Finally, Judge Rakoff observed that the agreements at issue contained Swiss choice-of-law clauses, and that Swiss law "strictly enforces privity of contract and generally prohibits nonparties from seeking to invoke contractual terms on their behalf." *Id.* at 506. Without addressing whether the choice-of-law clauses were an independent basis for denying arbitration, he stated that those clauses "reinforce[d] the appropriateness" of denying equitable relief to defendants.[8] *Id.*

Plaintiffs argue that we need not address the federal-law theories advanced by defendants under which a non-signatory to an arbitration agreement may compel a signatory to arbitrate. They assert that Swiss law governs the issue of whether defendants may invoke the arbitration clauses and that, under Swiss law, defendants may not. Defendants respond that federal law controls issues of arbitrability, and that in any event, Swiss law would permit them to obtain arbitration.

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[8] The District Court also held that, even if defendants could invoke the arbitration clauses, defendants would not be able to compel arbitration with Motorola because the arbitration clauses in the Motorola Agreements were "narrow" in scope (in contrast to those in the Nokia Agreements) and did not encompass Motorola's claims. *Uzan II*, 274 F. Supp. 2d at 506.

1. Choice of Law

Defendants moved to compel arbitration under Section 206, which permits a court to order that arbitration be held "in accordance with the agreement." 9 U.S.C. § 206. The agreements at issue here recite that they will be governed by Swiss law. *See Uzan II*, 274 F. Supp. 2d at 506.

We have applied a choice-of-law clause to determine which laws govern the validity of an agreement to arbitrate. *See Sphere Drake Ins. Ltd.* v. *Clarendon Nat'l Ins. Co.*, 263 F.3d 26, 32 n.3 (2d Cir. 2001). In *Sphere Drake*, we applied New York and New Jersey choice-of-law clauses to one party's claim that it was not bound by an arbitration agreement that its agent had signed while purportedly acting outside the scope of agency. *See id.*; *see also* Restatement (Second) of Conflicts of Laws § 218 (1971) (providing that the rules of conflicts of law apply to "[t]he validity of an arbitration agreement, and the rights created thereby"). More generally, a choice-of-law clause in a contract will apply to disputes about the existence or validity of that contract. *See, e.g., Int'l Minerals & Res., S.A.* v. *Pappas*, 96 F.3d 586, 592 (2d Cir. 1996) (applying an English choice-of-law clause to an issue of contract formation).

Defendants claim that a choice-of-law clause does not govern questions of contract validity where the ultimate issue is one of arbitrability. They rely principally on decisions that apply federal law to the question of arbitrability despite the presence of a choice-of-law clause designating another forum's laws. *See, e.g., Campaniello Imports*, 117 F.3d at 659, 668-69 (applying federal law to an arbitration clause in a contract containing an Italian choice-of-law clause, without discussing Italian law). However, these authorities do not hold that a court must set aside a choice-of-law clause in determining arbitrability; instead, they appear to be cases where neither party raised the choice-of-law issue. *See, e.g., Smith/Enron Cogeneration*

Ltd. P'ship v. *Smith Congeneration Int'l, Inc.*, 198 F.3d 88, 96 (2d Cir. 1999) ("While the language [of the agreement] might justify looking to Texas law . . . , neither party argued that it applied. Thus, we will apply the body of federal law under the FAA.").

Defendants also argue that applying federal law to the interpretation of arbitration agreements is required to further the purposes of the FAA and to create a uniform body of federal law on arbitrability. Their uniformity argument has some force where the parties have not selected the governing law. But where the parties have chosen the governing body of law, honoring their choice is necessary to ensure uniform interpretation and enforcement of that agreement and to avoid forum shopping. This is especially true of contracts between transnational parties, where applying the parties' choice of law is the only way to ensure uniform application of arbitration clauses within the numerous countries that have signed the New York Convention. Furthermore, respecting the parties' choice of law is fully consistent with the purposes of the FAA. *Cf. Volt Info. Scis., Inc.* v. *Bd. of Trustees*, 489 U.S. 468, 479 (1989) ("Where, as here, the parties have agreed to abide by [California] rules of arbitration, enforcing those rules according to the terms of the agreement is fully consistent with the goals of the FAA . . . .").

In short, if defendants wish to invoke the arbitration clauses in the agreements at issue, they must also accept the Swiss choice-of-law clauses that govern those agreements.

2. Swiss Law

After oral argument, we requested supplemental briefing from the parties on various points of Swiss law and invited the parties to submit statements from experts. Plaintiffs submitted a Joint Declaration of Dr. Pierre Karrer, Dr. Franz Kellerhals, and Dr. Beat Denzler (the "Karrer

Declaration"), while defendants submitted an Affidavit of Dr. Phillipe Schweizer (the "Schweizer Affidavit"). All of these experts are highly credentialed Swiss lawyers who have substantial experience with arbitration law.

Having reviewed these statements and their supporting authorities, we conclude that under Swiss law, defendants, as nonsignatories to the agreements, *may not* invoke the arbitration clauses contained in those agreements.

The Karrer Declaration, submitted by plaintiffs, concludes that under Swiss law, "a director, shareholder or employee of Telsim, or any other third party, would not be permitted to invoke the arbitration clause in the Finance Agreements." Karrer Decl. ¶ 16. Plaintiffs' experts admit that there are exceptions to this doctrine: where the nonsignatory is a successor in interest to a signatory, *id.* ¶¶ 18-20, or where the nonsignatory is willing to arbitrate. *Id.* ¶ 21. They cite a decision of the Swiss Federal Tribunal (the highest court in Switzerland), which provides, in relevant part:

> [I]n principle an arbitration clause is binding only on those parties which have entered into a contractual agreement to submit to arbitration, whether directly or indirectly through their representatives. Exceptions to this rule arise in cases of legal succession, retroactive approval of an arbitration clause or attempts to pierce the corporate veil of a legal entity in the case of abusive objections to the clause.

See Swiss Federal Tribunal, decision of May 19, 2003, 4C.40/2003, No. 4.1, *appended* to Karrer Declaration.[9]

Plaintiffs' experts state that "[t]here is no Swiss authority where a Non-Signatory has even tried to

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[9] Defendants do not claim to be successors in interest to the signatories, Telsim and Rumeli, or argue that Telsim and Rumeli were acting as their representatives in signing the agreements.

compel/invoke arbitration against a Signatory . . . ." Karrer Decl. ¶ 26. Defendants' expert, Dr. Phillipe Schweizer, does not reach any contrary conclusion. He reviews five decisions of the Swiss Federal Tribunal, each of which addresses attempts by a signatory to invoke an arbitration clause against a *nonsignatory*. Schweizer Aff. 3-5. The rule that emerges from these cases, and the declarations offered by the experts of both sides, is that a nonsignatory may be required to arbitrate in certain circumstances where it acts in bad faith. As Schweizer summarizes, "[a] person who adopts a certain mode of behavior, which clearly reflects his objective intentions, recognizable as such by his contractual partners and by third parties, may not, as a rule, subsequently avail himself of the fact that the perceptions he has created do not correspond to his true intentions . . . ." *Id.* at 6. Schweizer describes this as "the principle of good faith."[10] *Id.*

Schweizer has offered no authority in which a non-signatory has attempted to invoke an arbitration clause, much less succeeded in doing so. Moreover, it is noteworthy that Schweizer does not directly conclude that defendants could invoke the arbitration clauses in this case. He concludes, referring to "the non-signatory natural and legal persons" here—that is, defendants—that "it is difficult to imagine an arbitral tribunal convened in Switzerland, declining jurisdiction with regard to these same persons, supposing that they challenged the jurisdiction of an arbitral tribunal over them." Schweizer Aff. 5-6. In other words, a Swiss arbitral tribunal would not decline jurisdiction over *defendants*, if *defendants* were to

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[10] Plaintiffs' experts agree that a signatory may invoke an arbitration clause against a nonsignatory in those "exceptional circumstances" where the nonsignatory abuses its rights or acts in bad faith. Karrer Decl. ¶¶ 22-24, 26.

challenge the tribunal's jurisdiction in an arbitration brought by *plaintiffs*.

Defendants argue that the decisions cited by Schweizer—which address whether a signatory can invoke an arbitration clause against a nonsignatory—imply that a nonsignatory can likewise invoke an arbitration clause against a signatory. *See* Defs.' Supp. Br. at 22-23 (referring to the issue of whether a signatory could compel a nonsignatory to arbitrate as a "more difficult issue" than that presented here). These decisions, however, do not support defendants' conclusion. First, and rather conspicuously, defendants' expert does not draw such a conclusion about Swiss law. Second, the rationale underlying the decisions—which Schweizer describes as "the principle of good faith"—does not require plaintiffs to arbitrate in the instant case. There is no evidence that plaintiffs acted in bad faith or in any way manifested an intent to enter into a contract with the Uzans as individuals. In contrast, the District Court's opinion is replete with findings that *defendants* repeatedly acted in bad faith. *See, e.g.*, *Uzan II*, 274 F. Supp. 2d at 505 (applying the doctrine of "unclean hands" to bar defendants from equitable relief). In these circumstances, defendants have no basis for invoking a principle of good faith.

In sum, even accepting Schweizer's affidavit at face value, it does not materially advance defendants' position.

We therefore conclude that under Swiss law, which governs the agreements at issue, defendants, as nonsignatories, have no right to invoke those agreements. We accordingly affirm the District Court's denial of defendants' motion to compel arbitration.[11]

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[11] Defendants also argue that, "[a]t the very least, the question [of arbitrability] should have been referred to the Swiss tribunal in the first instance." Defs.' Reply Br. at 12 n.5. The District Court was not, however, required to refer questions of arbitrability to a Swiss

B. *The District Court's Jurisdiction Pending Appeal*

Defendants next argue that their filing of a notice of appeal from the District Court's order denying their motion to compel arbitration deprived the District Court of jurisdiction to proceed. The District Court refused to stay the proceedings, finding that defendants' appeal was frivolous. We hold that, although defendants' appeal was not frivolous, the District Court did have jurisdiction to continue with the case in the absence of a stay from this Court.

The Supreme Court has stated that "[t]he filing of a notice of appeal is an event of jurisdictional significance—it confers jurisdiction on the court of appeals and divests the district court of its control over those aspects of the case involved in the appeal." *Griggs* v. *Provident Consumer Discount Co.*, 459 U.S. 56, 58 (1982); *see also New York State Nat'l Org. for Women* v. *Terry*, 886 F.2d 1339, 1350 (2d Cir. 1989) ("[T]he filing of a notice of appeal only divests the district court of jurisdiction respecting the questions raised and decided in the order that is on appeal."). The

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arbitrator. Defendants seem to concede that, under either United States federal law or Swiss law, a court is required to determine, before compelling arbitration or dismissing the action on the basis of an arbitration clause, that the parties have an agreement to arbitrate. *See* Defs.' Supp. Br. at 24 ("If the question is presented in the first instance to a Swiss court, the court's inquiry is similar to the limited inquiry United States courts make under the FAA. Article 7 of the [Swiss Private International Law of Arbitration] provides that the Swiss court 'shall' decline jurisdiction over an arbitrable dispute unless it finds that the agreement is 'null and void, inoperative or incapable of being performed.'"). Defendants also assert that "[t]he first task of a court asked to compel arbitration of a dispute . . . 'is to determine whether the parties agreed to arbitrate that dispute.'" Defs.' Supp. Br. at 14 (quoting *Mitsubishi Motors Corp.* v. *Soler Chrysler Plymouth, Inc.*, 473 U.S. 614, 626 (1985)). The District Court therefore properly undertook to determine whether the parties had an agreement to arbitrate.

issue, therefore, is whether the trial of a case on the merits is "involved in" an appeal of an order denying arbitration.

The only authority in this Circuit strongly suggests that it is not. In *In re Salomon Inc. Shareholder Derivative Litigation*, 68 F.3d 554, 556 (2d Cir. 1995), deciding an appeal from the denial of a motion to compel arbitration, we refused to stay the proceedings below, and we "affirm[ed] the decision [of the district court] to proceed to trial."

In re Salomon involved a shareholders' derivative suit brought on behalf of Salomon Brothers against several former employees, arising from a Treasury Bill auction scandal. *See id.* at 555. The defendant employees sought to compel arbitration under the FAA, based on agreements they had signed with Salomon Brothers providing for arbitration of any disputes arising out of their employment. *See id.* The district court initially granted the motion and referred the matter to the New York Stock Exchange ("NYSE"), the arbitral forum designated in the arbitration agreements. *See id.* The NYSE, however, declined to arbitrate the dispute, and the defendants went back to the district court, seeking an order compelling arbitration, staying trial pending arbitration, and appointing substitute arbitrators under Section 5 of the FAA. *See id.* at 555-56. The district court denied that motion, and the defendants appealed.

We ultimately affirmed the district court's order denying arbitration, holding that "[b]ecause the parties had contractually agreed that *only* the NYSE could arbitrate any disputes between them, Judge Patterson properly declined to appoint substitute arbitrators and compel arbitration in another forum." *Id.* at 559. Prior to our decision, however, the defendants on two occasions asked this Court for a stay of the trial pending appeal, and each time we refused. *Id.* at 557. We concluded that we would "not disturb Judge Patterson's decision to proceed to trial." *Id.* at 561.

Our decision in *In re Salomon* plainly contemplated that a district court has jurisdiction to proceed with a case despite the pendency of an appeal from an order denying a motion to compel arbitration. We approved Judge Patterson's decision to deny the defendants a stay pending appeal, and we twice denied the same relief to defendants when they moved in this Court for a stay.

Other circuits are divided on this question. The Ninth Circuit has held that an appeal from an order denying a motion to compel arbitration "does not deprive the district court of jurisdiction over other proceedings in the case." *See Britton* v. *Co-op Banking Group*, 916 F.2d 1405, 1412 (9th Cir. 1990). The Court observed that either the district court or the court of appeals may—but is not required to—stay the proceedings upon determining that the appeal presents a substantial question. *Id.* at 1412 & n.8. In contrast, the Seventh and Eleventh Circuits have held that a district court may not proceed after the filing of a nonfrivolous appeal from an order denying arbitration. *See Blinco* v. *Green Tree Servicing, LLC*, 366 F.3d 1249, 1251 (11th Cir. 2004) ("Upon motion, proceedings in the district court ... should be stayed pending resolution of a nonfrivolous appeal from the denial of a motion to compel arbitration."); *Bradford-Scott Data Corp.* v. *Physician Computer Network, Inc.*, 128 F.3d 504, 507 (7th Cir. 1997). Notably, in both *Blinco* and *Bradford-Scott* the Courts of Appeals *granted a stay* of the district court proceedings pending appeal. *In no case* has a Court of Appeals granted the relief that defendants now seek—undoing a trial because the district court lacked jurisdiction to proceed after an appeal from an order denying arbitration.

We now follow *In re Salomon Brothers* and explicitly adopt the Ninth Circuit's position that further district court proceedings in a case are not "involved in" the appeal of an order refusing arbitration, and that a district court there-

fore has jurisdiction to proceed with a case absent a stay from this Court.[12]

C. *Supplemental Jurisdiction*

Defendants argue next that the District Court could not exercise supplemental jurisdiction over plaintiffs' state-law claims because it had no subject matter jurisdiction over plaintiffs' federal claims. They argue further that, even if the Court had jurisdiction over the RICO claims, the Court abused its discretion when it exercised supplemental jurisdiction over plaintiffs' state-law claims after both the RICO claims and the other federal claims in the complaint had been dismissed.

Defendants' first argument can be swiftly rejected. When our Court directed the District Court to dismiss plaintiffs' RICO claims on the ground that they were not ripe for adjudication, we stated specifically that plaintiffs lacked *statutory* standing under 18 U.S.C. § 1964(c), rather than constitutional standing under Article III. *See Uzan I*, 322 F.3d at 135 ("Plaintiffs lack *statutory* standing under RICO." (emphasis added)).[13] Specifically, we concluded that

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[12] Defendants moved for a stay in this Court on November 1, 2002, pending their appeal (in docket number 02-9302) of the District Court's denial of their motion to compel arbitration. This motion was ultimately denied as moot on March 7, 2003, as part of this Court's decision on the merits leaving intact the preliminary injunction issued by the District Court. *See Uzan I*, 322 F.3d at 139.

[13] In doing so, we dismissed Motorola's RICO claim on the merits rather than for lack of subject matter jurisdiction. *See Lerner* v. *Fleet Bank, N.A.*, 318 F.3d 113, 129-30 (2d Cir. 2003) (holding that lack of statutory standing under RICO "is not jurisdictional in nature . . . but is rather an element of the merits addressed under a Fed. R. Civ. P. 12(b)(6) motion for failure to state a claim"). We then remanded the case to the District Court to determine "whether to retain supplemental jurisdiction over the state law claims pursuant to 28 U.S.C. § 1367(c)," *Uzan I*, 322 F.3d at 137, a step which would have been unnecessary had we believed that the plaintiffs have not suffered the "injury in fact" necessary for Article III standing.

because the plaintiffs had not fully exhausted their contractual remedies against Telsim, including foreclosing on the collateral, the damage to the plaintiffs' property interests had not fully crystallized. *See Uzan I*, 322 F.3d at 136-37.

In any event, it is readily apparent that defendants' dilution and eventual destruction of plaintiffs' collateral amounts to the requisite "injury in fact" for Article III purposes, even if that injury is not sufficiently definite for RICO purposes. *See Baur* v. *Veneman*, 352 F.3d 625, 632 (2d Cir. 2003) (explaining that under Article III, a plaintiff need demonstrate only an "actual or imminent" injury). Here, the *injury* to Motorola and Nokia was not contingent on any future event, even if the *damages* stemming from that injury could not be identified with precision at the pleading stage.

Defendants' alternative argument—namely, that the District Court abused its discretion when it exercised supplemental jurisdiction over plaintiffs' Illinois claims even after dismissing all the federal claims in the complaint—is more substantial, but it too does not persuade us that the District Court was obligated to decline jurisdiction in these circumstances. The supplemental jurisdiction statute, 28 U.S.C. § 1367, provides in relevant part that

> (c) [t]he district courts may decline to exercise supplemental jurisdiction over a claim under subsection (a) if (1) the claim raises a novel or complex issue of State law, (2) the claim substantially predominates over the claim or claims over which the district court has original jurisdiction, (3) the district court has dismissed all claims over which it has original jurisdiction, or (4) in exceptional circumstances, there are other compelling reasons for declining jurisdiction.

Under § 1367(c)(3), it is indisputable that Judge Rakoff could have declined to exercise supplemental jurisdiction

after we directed him to dismiss plaintiffs' RICO claims and after he dismissed plaintiffs' other federal claims. The issue is whether he was obligated to do so. We review the District Court's decision to exercise supplemental jurisdiction over state-law claims for abuse of discretion. *Marcus* v. *Am. Tel. & Tel. Co.*, 138 F.3d 46, 57 (2d Cir. 1998). When, as in this case, a federal court dismisses all claims over which it had original jurisdiction, it must reassess its jurisdiction over the case by considering several related factors—judicial economy, convenience, fairness, and comity. *Nowak* v. *Ironworkers Local 6 Pension Fund*, 81 F.3d 1182, 1191 (2d Cir. 1996).

Applying these factors, our Court has held, as a general proposition, that "if [all] federal claims are dismissed *before trial* . . . , the state claims should be dismissed as well." *Castellano* v. *Bd. of Trustees*, 937 F.2d 752, 758 (2d Cir. 1991) (quoting *United Mine Workers* v. *Gibbs*, 383 U.S. 715, 726 (1966)) (emphasis added); *accord Giordano* v. *City of New York*, 274 F.3d 740, 754 (2d Cir. 2001). However, we have also held that when "the dismissal of the federal claim occurs 'late in the action, after there has been substantial expenditure in time, effort, and money in preparing the dependent claims, knocking them down with a belated rejection of supplemental jurisdiction may not be fair. Nor is it by any means necessary.'" *Purgess* v. *Sharrock*, 33 F.3d 134, 138 (2d Cir. 1994) (quoting 28 U.S.C.A. § 1367, Practice Commentary (1993) at 835).

The District Court concluded that "this is a particularly strong case" for retaining jurisdiction because "the Court has not only spent considerable time dealing with the legal issues and becoming fully conversant with the facts but *also* has conducted a trial on the merits." *Uzan II*, 274 F. Supp. 2d at 497 (emphasis added). We agree. Considering the significant (and probably non-duplicable) judicial resources that the District Court expended to evaluate the enormous record, to craft findings of fact, and to impose remedies, "it

would have 'stood judicial economy on its head' not to proceed with the state claims" after our remand. *Enercomp, Inc.* v. *McCorhill Publ'g, Inc.*, 873 F.2d 536, 546 (2d Cir. 1989).[14] Indeed, based on reasoning similar to the District Court's, our Court has upheld the exercise of supplemental jurisdiction in situations where far fewer resources were expended before the dismissal of federal claims. *See Ametex Fabrics, Inc.* v. *Just In Materials, Inc.*, 140 F.3d 101, 105-06 (2d Cir. 1998) (holding that the district court did not abuse its discretion in maintaining jurisdiction after discovery and a settlement conference had taken place).

Additionally, where, as in the instant case, defendants take affirmative steps to frustrate any potential enforcement of a judgment against them, we perceive a strong "fairness to litigants" argument in favor of maintaining jurisdiction. *Cf. Correspondent Servs. Corp.* v. *First Equities Corp.*, 338 F.3d 119, 127 (2d Cir. 2003) (recognizing "fairness to litigants" as an important consideration under 28 U.S.C. § 1367). The District Court in the instant case found that, in addition to diluting and then cancelling plaintiffs' collateral, defendants have, *inter alia*, failed to comply with orders to release their foreign bank records, failed to submit proper asset disclosures to an English

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[14] Our decision in *Kidder, Peabody & Co.* v. *Maxus Energy Corp.*, 925 F.2d 556 (2d Cir. 1991), where we stated that "[t]he judicial economy factor should not be the *controlling* factor, and it may be appropriate for a court to relinquish jurisdiction over pendent claims even where the court has invested considerable time in their resolution," *id.* at 564 (emphasis added), does not compel a different conclusion. In that case, concurrent state court proceedings that implicated the same issues of state law decided by the district court "were moving along and were almost at the discovery stage." *Id.* Here, by contrast, no concurrent proceeding is pending in Illinois. Moreover, as noted above, "judicial economy" is not the sole factor weighing in favor of supplemental jurisdiction.

Court, failed to appear for depositions, and initiated foreign proceedings for the sole purpose of impeding and evading the orders of the District Court. The District Court found also that defendants did not comply with its orders to suspend and then to reverse the process by which plaintiffs' collateral was diluted. Although a district court must, of course, adhere to the requirement that it have original jurisdiction over a federal claim before it asserts supplemental jurisdiction over pendent state claims, *see* 28 U.S.C. § 1367(a) (providing supplemental jurisdiction over state-law claims that are part of the same case or controversy as claims "within [the district court's] original jurisdiction"), it would hardly be "fair to litigants" for district courts to close their eyes to a plaintiff's dwindling prospects of enforcing a judgment because of a defendant's egregious and obstructive conduct. Here, in light of what the District Court found to be defendants' pattern of concealing and diverting assets, there is every reason to believe that defendants would have exploited any delay associated with the transfer of this case to Illinois. The District Court in no way abused its discretion by preventing defendants from doing so.

In response to the District Court's reliance on judicial economy and fairness, defendants claim that the District Court failed adequately to weigh "comity." Specifically, according to defendants, the Court improperly reached out to decide the "novel state law question whether [Motorola's] Illinois fraud claim is ripe." For the reasons stated in the next section, we do not accept the view that the ripeness question is somehow "novel." Therefore, we reject defendants' contention that the District Court was required to decline jurisdiction based on considerations of comity.

D. *Ripeness*

The defendants assert that, under Illinois law, Motorola's fraud claims are unripe for the same reasons that the RICO claims were deemed unripe by this Court in *Uzan I*. *See*

Uzan I, 322 F.3d at 136-37 (directing dismissal of RICO claims because damages were not yet "clear and definite" for purposes of RICO standing). Specifically, according to defendants, the Illinois fraud claims, like the RICO claims, are not ripe because the damages suffered by the plaintiffs will not be "clear and definite" until Telsim defaults on its obligations. We disagree.

Under Illinois law, as established by an intermediate appellate court of that state, "absolute certainty concerning the amount of damage is not necessary to justify a recovery where the existence of damage is established." *In re Application of Busse*, 464 N.E.2d 651, 655 (Ill. App. Ct. 1984).[15] By the same token, when such damage is established, "the evidence need only tend to show a basis for the computation of damages with *a fair degree of probability*." *Id.* (emphasis added). Thus, in *Busse*, which involved an action by vendors of land against a purchaser who fraudulently altered a subordination clause in a mortgage agreement, the Appellate Court of Illinois concluded that the plaintiff had a viable fraud claim based only on the willful impairment of collateral. *Id.* at 657; *cf. Hummer* v. *R.C. Huffman Constr. Co.*, 63 F.2d 372, 374-75 (7th Cir. 1933) (holding that, under Illinois law, a mortgagee need not foreclose the mortgage before bringing a tort action for harm done to the mortgaged property). In the absence of any "persuasive data" that the Illinois Supreme Court would disagree with *Busse*'s holding that the willful

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[15] Defendants point to several sentences in the *Busse* trial transcript suggesting that the plaintiffs in *Busse* sought rescission in addition to damages. Defendants then argue that the requirement of pecuniary injury does not apply to an action for "unilateral rescission" or avoidance. The problem with this argument is that the appellate court's decision states clearly that "[d]efendants' appeal is limited to the judgment entered against them for punitive and exemplary damages." 464 N.E.2d at 655. The court's relevant analysis is then limited to the damages remedy.

impairment of collateral is sufficient to support a fraud claim even without absolute certainty regarding the amount of damages suffered by the plaintiff, we defer to the *Busse* Court's interpretation of Illinois law. *See West* v. *Am. Tel. & Tel. Co.*, 311 U.S. 223, 237 (1940) ("Where an intermediate appellate state court rests its considered judgment upon the rule of law which it announces, . . . [it] is not to be disregarded by a federal court unless it is convinced by other persuasive data that the highest court of the state would decide otherwise."); *see also Comm'r* v. *Estate of Bosch*, 387 U.S. 456, 465 (1967) (citing *West*).

In an attempt to graft the heightened RICO standing requirements that we applied in *Uzan I* onto Illinois law, defendants claim that Illinois law requires Motorola to exhaust their remedies by foreclosing on the collateral that once secured Motorola's loans. This argument, which is merely a variation on the argument that damages must be "clear and definite" before they are cognizable, is rejected by *Busse* and *Hummer*. In *Busse*, the Court stated outright that "there is no reason or authority which would make a foreclosure or a foreclosure and sale on a deficiency judgment conditions precedent to maintaining such action, particularly as here, where the [fraudulent] acts were deliberately committed by defendants . . . ." 464 N.E.2d at 657. In *Hummer*, moreover, the Seventh Circuit, applying Illinois law, held that a lender's cause of action accrued at the time the defendant injured its collateral, regardless of the status of any foreclosure proceeding. *See* 63 F.2d at 375 ("[A] foreclosure proceeding might have been instituted, but under the greater weight of authority we think that fact can make no difference."). These decisions of an Illinois appellate court and of the Seventh Circuit are straightforward, and remain the best available readings of state law.

Defendants' reliance on *City of Chicago* v. *Michigan Beach Housing Coop.*, 696 N.E.2d 804 (Ill. App. Ct. 1998), is

misplaced. In *Michigan Beach*, a lender sued a debtor for fraud when it discovered that the debtor had misrepresented the number of units pre-sold in a housing project. *See id.* at 807. The court held that the plaintiff failed to prove damage because, among other things, *the loan was not due for 42 years*. *Id.* at 810. The alleged injury in *Michigan Beach* was wholly "speculat[ive]"; in the instant case, by contrast, defendants have already injured the plaintiffs by destroying the plaintiffs' collateral. *Michigan Beach*, therefore, serves only to highlight the difference between the type of wholly speculative injury that cannot serve as the basis for a fraud claim, on the one hand, and a claim based on the destruction of collateral and the immediate threat of a pecuniary harm, on the other hand. This case falls squarely in the second category.

Because considerations of fairness and efficiency weigh in favor of the District Court's decision, and because the Court did not decide a novel question of Illinois law, we perceive no abuse of discretion in the District Court's decision to maintain jurisdiction over the state-law claims in this case. *See Mauro* v. *S. New England Telecomm., Inc.*, 208 F.3d 384, 388 (2d Cir. 2000) (affirming district court's decision to assert jurisdiction over state-law claims where abstention "would have furthered neither fairness nor judicial efficiency, nor did those [claims] require the district court to resolve any novel or unsettled issues of state law").[16] Accordingly, we conclude that the District Court

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[16] Because certification to the Illinois Supreme Court is not available to us, *see* ILCS S. Ct. Rule 20, we need not consider whether discretionary certification would be appropriate in a case like this, an issue on which different views might well exist. The law of Illinois is clear enough so that, in view of the unfairness which would result from federal court abstention from exercising supplemental jurisdiction, it is not an abuse of discretion for the District Court to exercise that jurisdiction, and this remains so regardless of

had the requisite authority to decide plaintiffs' fraud and constructive trust claims.

E. *Personal Jurisdiction*

Finally, for substantially the reasons stated by the District Court, *see Uzan II*, 274 F. Supp. 2d at 517-34, 574-77, we hold that the District Court had personal jurisdiction over each of the defendants.

III. REMEDIES

The District Court imposed an array of remedies after final judgment, including (i) an award of compensatory damages to Motorola equal to the full amount of its loans to defendants plus prejudgment interest ($2,132,896,905.66); (ii) an award of punitive damages to Motorola equal to the same amount ($2,132,896,905.66); and (iii) an imposition of a constructive trust, in favor of plaintiffs, over 73.5% of Telsim's stock, along with an order requiring defendants to turn over those Telsim shares to the registry of the Court. The District Court also declared that plaintiffs could collect their judgments from *any* of the more than 130 corporate entities that are controlled by defendants.

On appeal, defendants do not challenge the award of compensatory damages, nor do they challenge the constructive trust established to benefit Nokia. Instead, defendants challenge (1) the constructive trust over approximately 66% of Telsim's shares to benefit *Motorola*;[17] (2) the

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one's view of the desirability or non-desirability of certification, were it available.

[17] At one point in their brief, defendants appear to suggest that they object to Nokia's constructive trust remedy along with Motorola's. *See* Appellants' Br. at 76, n.19 ("Assuming that a constructive trust is for some reason permissible for Nokia's benefit, that trust cannot consist of 73.5% of the Telsim shares ...."). However, the arguments put forward by defendants against the constructive trust, *i.e.*, that Motorola has an adequate remedy at law, and that the constructive trust would result in an improper double

order that defendants turn over those shares, along with the shares held in trust for Nokia, to the registry of the District Court; (3) the order allowing plaintiffs to enforce the judgment against 130 nonparties; and (4) the multi-billion dollar punitive damages award in favor of Motorola.

To a substantial degree, we agree with defendants that the District Court has not made findings sufficient to support these remedies. Accordingly, for the reasons stated below, we vacate the constructive trust entered for the benefit of Motorola, the order of the District Court permitting recovery from 130 nonparties, and the punitive damages award, and we remand the cause to the District Court for proceedings consistent with this opinion.

A. *The Constructive Trust and the Turnover Order*

1. Nokia

As an initial matter, we find no merit in defendants' contention that the District Court could not order defendants to turn over Nokia's shares in Telsim while a presumptively valid Turkish injunction barred Telsim shares from being transferred abroad.

In April 2002, Telsim distributors obtained four Turkish injunctions that forbid Telsim shares from being transferred abroad. Two of those injunctions have since been converted into permanent injunctions (in contrast to the Turkish injunctions purporting to enjoin the proceedings in the District Court, which have since been lifted). As defendants point out, it is well established that "a state may not require a person to do an act in another state that is prohibited by the law of that state or the law of the state of which he is a national." Restatement (Third) of Foreign Relations Law § 441 (1987). That rule is "a fundamental

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recovery in light of Motorola's damage award—simply do not apply to Nokia.

principle[ ] of international comity." *Ings* v. *Ferguson*, 282 F.2d 149, 152 (2d Cir. 1960).

It is also well established, however, that orders of foreign courts are not entitled to comity if the litigants who procure them have "deliberately courted legal impediments" to the enforcement of a federal court's orders. *Societe Internationale* v. *Rogers*, 357 U.S. 197, 208-09 (1958); *see also Laker Airways Ltd.* v. *Sabena*, 731 F.2d 909, 939-40 (D.C. Cir. 1984) (refusing to respect English court's order where the "defendants involved in the American suit had . . . gone into the English courts to generate interference with the American courts"); *China Trade & Dev. Corp.* v. *M.V. Choong Yong*, 837 F.2d 33, 36-37 (2d Cir. 1987) (citing *Laker Airways* with approval). Here, the District Court determined that the orders of the Turkish courts were "collusive" and "an overt attempt to interfere with [its] jurisdiction." More specifically, the District Court found, *inter alia*, that the distributors had no apparent motive to enjoin the transfer of Telsim shares; that the distributors enjoyed a very close relationship with the Uzans; that the timing of the filings in Turkey suggested that they were intended to thwart the District Court's proceedings just before the Court ruled on the preliminary injunction motion; that the suits in Turkey were nearly identical even though they were purportedly filed by different parties; and that the defendants' responses to the distributors' lawsuits were so pathetic that they actually indicated support for the suits. "Most telling of all," according to the District Court, was defendants' concealment of the Turkish injunctions from the District Court and the Court of Appeals.

These specific findings are not contested on appeal in any meaningful way, and we have no basis for doubting them. Although defendants baldly assert that the finding of collusion is "clearly incorrect" and "without support in the record," they offer no basis for these assertions. Indeed, they concede that the validity of the Turkish injunctions is

merely presumptive, and then fail to explain why the District Court's findings about their conduct are insufficient to overcome any presumption they might enjoy. In light of defendants' failure to explain why the District Court erred when it set aside the operative Turkish injunctions after finding that they were the product of collusion, we could only agree with defendants if there were some *per se* rule against setting aside or ignoring the orders of foreign courts. Our case law establishes no such rule.

2. Motorola

By contrast, we agree with defendants that the District Court did not adequately support its decision to impose a constructive trust for Motorola's benefit despite awarding money damages to Motorola. Our Court, applying New York law, has held that an equitable remedy such as a constructive trust is appropriate only if "the party seeking relief . . . demonstrate[s] that [its] remedies at law are incomplete and inadequate to accomplish substantial justice." *Lucente* v. *Int'l Bus. Machs. Corp.*, 310 F.3d 243, 262 (2d Cir. 2002). Here, the parties' briefs assume that New York law controls this issue, and such "'implied consent . . . is sufficient to establish choice of law.'" *Krumme* v. *WestPoint Stevens, Inc.*, 238 F.3d 133, 138 (2d Cir. 2000) (quoting *Tehran Berkeley Civil & Envtl. Eng'rs* v. *Tippett- Abbett-McCarthy-Stratton*, 888 F.2d 239, 242 (2d Cir. 1989)).

In their supplemental brief of July 23, 2004, plaintiffs suggest for the first time that Motorola's remedies at law are "inadequate to accomplish substantial justice" because their collateral consists of a unique property interest—namely, a controlling stake in a foreign company whose shares are not publicly traded. *See* Pls.' Supp. Br. at 28-29 (citing Dobbs, Law of Remedies § 9.3(4), at 596 (2d ed. 1993)). We are not well positioned to evaluate this argument in the first instance.

In contrast to most of its meticulous findings in this case, the District Court's findings regarding the adequacy of Motorola's remedies at law are neither clear nor specific. At one point, the District Court, albeit in response to a motion to *extend* the constructive trust beyond the collateral, noted that Motorola "has an adequate remedy at law." *Uzan II*, 274 F. Supp. 2d at 502. Further, in explaining its decision to impose contempt sanctions on defendants if they failed to turn over Telsim shares to Nokia, the District Court also stated that "*Nokia* has no meaningful remedy for the fraud perpetrated upon it other than the constructive trust," *id.* at 582 (emphasis added), thus implying that Motorola has such a remedy. Accordingly, although the District Court's extensive findings regarding defendants' conduct in impeding the judgment would seem to support the inference that Motorola needs a constructive trust as much as Nokia, these statements by the District Court suggest otherwise. With that in mind, we believe that the prudent course is to vacate the turnover order insofar as it applies to the shares pledged to Motorola and remand to the District Court for specific findings in support of that order.[18]

B. *Enforcement of the Judgment Against Nonparties*

Defendants argue further that, by allowing the judgment to be enforced against 130 companies purportedly controlled by the Uzans, the District Court pierced the

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[18] Because we vacate Motorola's constructive trust, we need not address defendants' objections to the turnover order entered in support of that trust, including defendants' claim that the turnover order violates Federal Rule of Civil Procedure 69, which states that the process for collecting a monetary judgment "shall be by writ of execution." We also need not address the claim that Motorola's constructive trust would result in an improper double recovery, because Motorola has been given both the value of its loans and the collateral securing the loans.

corporate veils of those companies without a sufficient factual basis. Once again, we agree.

The District Court relied on a variety of sources to conclude that the Uzan family controls numerous companies. These sources included annual reports, testimony by accountants, and records held by UBS, the Uzans' bank in New York. The Court also relied heavily on a report about the Uzans by forensic accountant Anthony B. Samuel (the "Samuel Report"), which was incorporated by reference into the findings of fact. Samuel concluded, *inter alia*, that the defendants massively diverted funds from Telsim and that the Uzans controlled "a single group operation" composed of numerous related entities.

Despite the evidence of "a single group operation," there is little evidence in the record before us about the specific 130 entities against whom the District Court allowed plaintiffs to enforce their judgment. The Samuel Report in particular mentions few of the 130 companies purportedly controlled by the Uzans, and the other documents relied on by the District Court consist of little more than lists of companies. Like the Samuel Report, these documents are silent as to whether the 130 entities were inadequately financed, failed to observe corporate formalities, or were marked by other indicia of sham entities. In sum, the documents cited by the District Court do not provide the evidence necessary to pierce the corporate veil of 130 separate entities under either New York or Illinois law. *See generally Gallagher* v. *Reconco Builders, Inc.*, 415 N.E.2d 560, 563-64 (Ill. App. Ct. 1980) (summarizing requirements for piercing corporate veil under Illinois law); *MAG Portfolio Consult, Gmbh* v. *Merlin Biomed Group, LLC*, 268 F.3d 58, 63 (2d Cir. 2001) (same under New York law).

In the absence of specific findings that the 130 entities are alter egos of the Uzans, we cannot reconcile the District Court's broad assessment of liability with fundamental notions of due process, including the principle that non-

parties must be accorded "an opportunity to be heard and participate in . . . litigation" that could give rise to a judgment against them. *Phillips Petroleum Co.* v. *Shutts*, 472 U.S. 797, 812 (1985). Thus, we vacate the District Court's order allowing plaintiffs to collect their judgment from the 130 nonparties, and remand the cause to the District Court with instructions (1) to give notice to any entities against whom plaintiffs' judgment might be enforceable, and (2) to the extent the District Court believes that enforcement of the judgment against any nonparties is appropriate, to make findings sufficient to support piercing the corporate veils of those entities under applicable state law.

C. *Punitive Damages*

Finally, defendants claim that the punitive damages award of $2,132,896,905.66 in favor of Motorola violates both the United States Constitution and Illinois law. With respect to federal law, they argue that the award violates the Due Process Clause. With respect to Illinois law, they argue that the award is excessive because it far exceeds the defendants' capacity to pay. We agree with defendants that the punitive damages award, in its current form, cannot be squared with federal or Illinois law. Accordingly, we vacate that award, and remand to the District Court to set a new award that comports with due process and Illinois law.

"Elementary notions of fairness enshrined in our constitutional jurisprudence dictate that a person receive fair notice not only of the conduct that will subject him to punishment, but also of the severity of the penalty that a State may impose." *BMW of N. Am., Inc.* v. *Gore*, 517 U.S. 559, 574 (1996). To determine whether a defendant has proper notice of a punitive damages award under the Due Process Clause, the Supreme Court has instructed us to look at three "guideposts": "(1) the degree of reprehensibility of the defendant's misconduct; (2) the disparity between the actual or potential harm suffered by the plaintiff and the punitive damage award; and (3) the

difference between the punitive damages awarded by the [factfinder] and the civil penalties authorized or imposed in comparable cases." *State Farm Mut. Auto. Ins. Co.* v. *Campbell*, 538 U.S. 408, 418 (2003) (repeating the three "guideposts" laid out in *Gore*).

As the Supreme Court observed, "'[t]he most important indicium of the reasonableness of a punitive damages award is the degree of reprehensibility of the defendant's conduct.'" *Id.* at 419 (quoting *Gore*, 517 U.S. at 575).[19] The reprehensibility of a defendant's conduct is determined by considering whether:

> the harm caused was physical as opposed to economic; the tortious conduct evinced an indifference to or a reckless disregard of the health or safety of others; the target of the conduct had financial vulnerability; the conduct involved repeated actions or was an isolated incident; and the harm was the result of intentional malice, trickery, or deceit, or mere accident. The existence of any one of these factors weighing in favor of a plaintiff may not be sufficient to sustain a punitive damages award; and the absence of all of them renders any award suspect.

Id. at 419 (citation omitted).

In the instant case, the District Court made no reference to these relevant factors. Instead, it simply stated without elaboration that "[c]onsidering the reprehensibility of defendants' conduct in this case, the Court perhaps would

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[19] The other two "guideposts" do not appear to be relevant here. There is no disparity between the size of the award and the actual harm suffered by the plaintiffs (a 1:1 ratio). Moreover, although the award is 42,000 times the penalty provided by Illinois' Deceptive Business Practices Act, as defendants observe, they do not seriously argue that that statute, which protects consumers from, *inter alia*, false advertising in promotional give aways, is "comparable" to the common law fraud claims here.

be justified in imposing an award of punitive damages several fold the amount of actual damages awarded." *Uzan II*, 274 F. Supp. 2d at 581. This analysis is insufficient to support such a substantial punitive damages award in this case, especially in light of the Supreme Court's admonition that "punitive damages should only be awarded [at all] if the defendant's culpability, after having paid compensatory damages, is so reprehensible as to warrant the imposition of further sanctions to achieve punishment or deterrence." *State Farm*, 538 U.S. at 419.

Although we agree with the District Court that, on this record, some punitive damages award is appropriate, we direct the District Court to reconsider the size of that award on remand. In doing so, the District Court should bear in mind that the harm caused by defendants was not "physical as opposed to economic." Moreover, defendants did not directly endanger the health and safety of others (except, perhaps, insofar as they induced Turkish authorities to arrest executives based on trumped up charges), and plaintiffs in this case were arguably not "financially vulnerab[le]." *Id.* It appears to us, on the basis of the record to date, that only two of the factors mentioned by the Supreme Court—repetition and intent—weigh in favor of punitive damages in these circumstances.

Of course, the size of any award in this case should not be based only on how many relevant factors weigh in favor of a punitive damages award. Instead, because defendants inflicted an economic injury, the District Court should consider both the severity of defendants' misconduct, *see Gore*, 517 U.S. at 576 (noting that "economic injury, especially when done intentionally through affirmative acts of misconduct . . ., can [still] warrant a substantial penalty" (citation omitted)), and the extent to which a punitive award is needed to deter other potential perpetrators. *See id.* at 582 (noting that "[a] higher ratio" of punitive to compensatory damages "may . . . be justified in cases in which

the injury is hard to detect"); *see also Ciraolo* v. *City of New York*, 216 F.3d 236, 243 (2d Cir. 2000) (Calabresi, J., concurring) (explaining that a function of punitive damages where harm is economic is to deter perpetrators who may not be caught).

Quite apart from the constitutional considerations noted above, the punitive damage award must also be reassessed under Illinois law. In Illinois, "before a court can gauge [a proper punitive damages award], it must first gauge the financial position of the wrongdoer." *Hazelwood* v. *Ill. Cent. Gulf R.R.*, 450 N.E.2d 1199, 1207 (Ill. App. Ct. 1983). Based on that principle, one Illinois appellate court has overturned an award of 2% of the proven net worth of a corporate defendant on the ground that it was "excessive in the extreme." *Proctor* v. *Davis*, 682 N.E.2d 1203, 1217 (Ill. App. Ct. 1997) (overturning an award against a corporation, which had demonstrated that it had a net worth of $1.7 billion).

Plaintiffs are correct that, under Illinois law, defendants bear "the burden of putting on" relevant evidence of net worth in objecting to a punitive damage assessment. *Ford* v. *Herman*, 737 N.E.2d 332, 339 (Ill. App. Ct. 2000). Moreover, it is undisputed that, in the instant case, defendants did not put forward any evidence of their net worth.

Plaintiffs would have this Court conclude that, once defendants failed to establish their net worth in the District Court, *any* punitive damages award could be assessed against them under Illinois law. We reject this view. In this case, the District Court was presented with substantial evidence about the Uzans' property interests, and it even cited one item of evidence that purported to quantify the Uzans' net worth—an article in *Forbes Magazine* that estimated their net worth at $1.3 billion.[20] Nevertheless,

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[20] In *Ford*, by contrast, where the Appellate Court of Illinois held that defendants have the burden of putting on evidence of net worth,

having already assessed more than $2 billion in compensatory damages—$800,000,000 beyond defendants' estimated net worth—the Court set punitive damages without any consideration of defendants' ability to pay such a hefty sum.

Because the District Court set punitive damages in this case without considering factors that have been deemed relevant by the United States Supreme Court as well as Illinois appellate courts, we vacate the District Court's punitive damages award, and remand to the District Court to recalculate the award. In setting a new award, we instruct the District Court to consider, *inter alia*, the nature of the harm caused by defendants, the need to deter other potential perpetrators from engaging in activity similar to defendants', and defendants' capacity to pay whatever award is assessed.

IV. THE CROSS-APPEAL

In their cross-appeal, plaintiffs argue that the District Court abused its discretion when it denied their motion, pursuant to Fed. R. Civ. P. 15(d), to file a supplemental complaint reinstating their RICO claims. The District Court denied the plaintiffs' motion on the ground that, under our decisions in *Uzan I* and *First Nationwide Bank* v. *Gelt Funding Corp.*, 27 F.3d 763, 768 (2d Cir. 1994), filing a supplemental complaint would be futile. *Cf., e.g., Acito* v. *IMCERA Group, Inc.*, 47 F.3d 47, 55 (2d Cir. 1995) ("One good reason to deny leave to amend is when such leave would be futile."). On appeal, the plaintiffs argue that they should be permitted to supplement because (1) the RICO ripeness standards articulated in *First Nationwide* are erroneous and should be reconsidered, and (2) even

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the factfinder had been presented with no evidence whatsoever regarding the defendant's net worth. *See Ford*, 737 N.E.2d at 339.

under those standards, and notwithstanding our previous decision on the issue, they have stated a ripe RICO claim.

We are bound by *First Nationwide* and by our own application of *First Nationwide* to the facts of this case in *Uzan I*. Accordingly, we dismiss the cross-appeal as meritless.

V. CONCLUSION

Judge Rakoff has conducted this sprawling case with extraordinary energy, diligence, and care. We affirm his exercise of subject-matter and personal jurisdiction over the defendants. Specifically, we hold that:

1. The District Court correctly denied defendants' motion to compel arbitration, because the arbitration clause was governed by Swiss law, under which a nonsignatory may not invoke an arbitration clause in the circumstances presented here.

2. Absent a stay from this Court—which, though sought by defendants, was not granted—the District Court had jurisdiction to proceed with the case pending defendants' appeal from the denial of their motion to compel arbitration.

3. The District Court did not abuse its discretion by exercising supplemental jurisdiction over plaintiffs' state-law claims, based on considerations of efficiency and fairness to the litigants.

4. The District Court correctly concluded that plaintiffs' fraud claims were ripe for adjudication under Illinois law.

5. The District Court properly exercised personal jurisdiction over defendants.

In addition, we reject plaintiffs' cross-appeal as without merit.

Despite the District Court's skillful and comprehensive efforts, we hold that:

6. The District Court failed to make sufficiently specific factual findings in support of certain remedies it awarded.

Accordingly, we vacate the District Court's judgment to the extent that it (a) imposed a constructive trust, for the benefit of Motorola Credit Corporation, over 66% of the stock of a company controlled by defendants; and (b) permitted plaintiffs to enforce their judgment against 130 nonparties to this litigation. Additionally, we vacate the District Court's judgment to the extent that it (c) awarded punitive damages to Motorola in the amount of $2,132,896,905.66, and we remand for reconsideration of that award under the Due Process Clause of the United States Constitution and Illinois law, and for any further factfinding that the District Court deems appropriate or necessary.

We remand the cause for further proceedings and findings of fact consistent with this opinion.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Docket Nos. 03-7792(L), 03-7794(CON),
03-7796(CON), 03-7878(XAP)

MOTOROLA CREDIT CORPORATION AND NOKIA CORPORATION, PLAINTIFFS-APPELLEES-CROSS-APPELLANTS

v.

KEMAL UZAN, CEM CENGIZ UZAN, MURAT HAKAN UZAN, MELAHAT UZAN, AYSEGUL AKAY, ANTONIO LUNA BETANCOURT, UNIKOM ILETISM HIZMETLERI PAZARLAMA A.S., STANDART PAZARLAMA A.S., AND STANDART TELEKOMUNIKASYON BILGISAYAR HIZMETLERI A.S., DEFENDANTS-APPELLANTS-CROSS-APPELLEES

October 22, 2004

JUDGES PRESENT: ROGER J. MINER, GUIDO CALABRESI, JOSE A. CABRANES, Circuit Judges.

SUMMARY ORDER:

UPON DUE CONSIDERATION, IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that the motion to dismiss this appeal under the fugitive disentitlement doctrine is hereby DENIED.

By an opinion filed on the same day as this order, this Court affirmed in part and vacated in part the judgment of the District Court in favor of plaintiffs. As a threshold matter, plaintiffs move to dismiss the instant appeal under the fugitive disentitlement doctrine. We deny this motion.

Defendants do not dispute that we have the discretion to dismiss this appeal under *Empire Blue Cross & Blue Shield* v. *Finkelstein*, 111 F.3d 278 (2d Cir. 1997), in which we dismissed an appeal by civil defendants who fled the jurisdiction after an adverse judgment was entered against them, thus rendering the judgment unenforceable.

However, we decline to exercise that discretion for two reasons. First, unlike the parties in *Finkelstein*, who decamped from the jurisdiction after an adverse judgment, *see Finkelstein*, 111 F.3d at 281-82, the individual defendants in this case have resided in a foreign country all along, and were only "present" in the Southern District in the barest sense necessary to support personal jurisdiction. Although there is no per se rule against dismissing the appeal of a nonresident, we believe that a nonresident who appeals an adverse judgment is in a different position than the typical fugitive who leaves a jurisdiction for the sole purpose of evading a judgment. Second, this appeal principally involves discrete challenges to the District Court's subject matter jurisdiction that can be adjudicated without the appellants being present either before the District Court or before this Court. We conclude that defendants' actions have not been "sufficiently disruptive of the appellate process that dismissal would be a reasonable response." *Ortega-Rodriguez* v. *United States*, 507 U.S. 234, 251 (1993).

The motion to dismiss is therefore denied.

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Docket Nos. 03-7792(Lead), 03-7794 (con.);
03-7796(con.); 03-7878(XAP)

KROLL ASSOCIATES, INC., *ET AL.*, COUNTER-DEFENDANTS,

MOTOROLA CREDIT CORPORATION, *ET AL.*, PLAINTIFFS-COUNTER-DEFENDANTS-APPELLEES-CROSS-APPELLANTS,

v.

UNIKOM ILETISM HIZMETLERI, *ET AL.*, DEFENDANTS-APPELLANTS-CROSS-APPELLEES,

CEM CENGIZ, *ET AL.*, DEFENDANTS-COUNTER-CLAIMANT-APPELLANT-CROSS-APPELLEES

[Filed: April 16, 2004]

PRESENT: HON. ROSEMARY S. POOLER AND HON. SONIA SOTOMAYOR, Circuit Judges*

On February 6, 2004, our motions panel entered an order dictating that the mandate in this case issue forthwith. However, because the case was still pending before our Court's en banc panel at the time our order was entered,

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* Due to the untimely death of the Honorable Fred I. Parker, the remaining panel members will decide the matter. *See* 2D CIR. R. 0.14(b).

the mandate was not issued immediately. Following circulation to the en banc panel the issuance of the mandate was held. Now, upon due consideration, it is ORDERED that the orders entered by this Court on September 26, 2003 and February 6, 2004, are vacated and the matter is to be referred to a merits panel in the normal course. It is FURTHER ORDERED that defendants-appellants' motion for stay is hereby referred to said merits panel and that the stay entered by our Court on August 15, 2003, shall remain in force until the merits panel reaches a decision on the motion for a stay or on the merits. In addition, it is FURTHER ORDERED that all other motions filed by both the defendants-appellants and the plaintiffs-appellees are denied without prejudice to their renewal before the merits panel. Finally, it is FURTHER ORDERED that the docket entries suggesting that the mandate was issued to the district court on February 6, 2004, and recalled by letter from the district court on February 19, 2004, be removed.

FOR THE COURT:
Roseann B. Mackechnie,
Clerk

By: /s/ Lucille Carr

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Docket Nos. 03-7792(Lead), 03-7794 (con.);
03-7796(con.); 03-7878(XAP)

KROLL ASSOCIATES, INC., *ET AL.*, COUNTER-DEFENDANTS,

MOTOROLA CREDIT CORPORATION, *ET AL.*, PLAINTIFFS-COUNTER-DEFENDANTS-APPELLEES-CROSS-APPELLANTS,

v.

UNIKOM ILETISM HIZMETLERI, *ET AL.*, DEFENDANTS-APPELLANTS-CROSS-APPELLEES,

CEM CENGIZ, *ET AL.*, DEFENDANTS-COUNTER-CLAIMANT-APPELLANT-CROSS-APPELLEES

[Filed: Feb. 06, 2004]

PRESENT: HON. ROSEMARY S. POOLER AND HON. SONIA SOTOMAYOR, Circuit Judges*

The individual defendants-appellants move for reconsideration, with a suggestion for reconsideration *en banc*, of this Court's September 26, 3003 order, and a stay pending disposition of the motion for reconsideration. Upon due

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* Due to the untimely death of the Honorable Fred I. Parker, the remaining panel members will decide the matter. *See* 2D CIR. R. 0.14(b).

consideration, it is ORDERED that the motion for reconsideration is denied because the movants have failed to show that this Court has overlooked or misapprehended a relevant point of law or fact. *See Chang* v. *United States*, 250 F.3d 79, 82 (2d Cir. 2001); *Mancuso* v. *Herbert*, 166 F.3d 97 (2d Cir. 1999). It is FURTHER ORDERED that the stay motion is denied. *See Mohammed* v. *Reno*, 309 F.3d 95, 100 (2d Cir. 2002). A mandate shall issue forthwith in this matter as well as docket numbers 03-7792 and 03-7794 because these appeals were filed by the individual defendants and were dismissed by this Court's September 26, 2003 order.

FOR THE COURT:
Roseann B. Mackechnie,
Clerk

By: /s/ Lucille Carr

A TRUE COPY
Roseann B. Mackechnie,
Clerk

By: /s/ Tammy Martinez
DEPUTY CLERK

CERTIFIED: 2-6-04

APPENDIX E

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Docket Nos. 03-7792(Lead), 03-7794 (con.);
03-7796(con.); 03-7878(XAP)

KROLL ASSOCIATES, INC., *ET AL.*, COUNTER-DEFENDANTS,

MOTOROLA CREDIT CORPORATION, *ET AL.*, PLAINTIFFS-COUNTER-DEFENDANTS-APPELLEES-CROSS-APPELLANTS,

v.

UNIKOM ILETISM HIZMETLERI, *ET AL.*, DEFENDANTS-APPELLANTS-CROSS-APPELLEES,

CEM CENGIZ, *ET AL.*, DEFENDANTS-COUNTER-CLAIMANT-APPELLANT-CROSS-APPELLEES

[Filed: Sept. 26, 2003]

PRESENT: HON. ROSEMARY S. POOLER AND HON. SONIA SOTOMAYOR, Circuit Judges*

Appellees move to dismiss the appeal based on the fugitive disentitlement doctrine. The appellants move for a stay of judgment pending appeal and for an expedited appeal. Upon due consideration, it is ORDERED that the

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* Due to the untimely death of the Honorable Fred I. Parker, the remaining panel members will decide the matter. *See* 2D CIR. R. 0.14(b).

appellees' motion to dismiss is granted, in part, and the appeal is dismissed as to the individual defendants-appellants. *See Degen* v. *United States*, 517 U.S. 820, 824 (1996); *Empire Blue Cross and Blue Shield* v. *Finkelstein*, 111 F.3d 278 (2d Cir. 1997). The appellants' stay motion is denied as moot as to the individual defendants. As to the corporate defendants, it is ORDERED that the judgment is vacated and remanded so that the district court may determine whether the corporate defendants were alter-egos of the individual defendants. *See Wm. Passolacqua Builders, Inc.* v. *Resnick Developers, Inc.*, 933 F.2d 131 (2d Cir. 1991). After the district court renders its decision, this appeal will be referred to a merits panel, which panel will also consider whether the fugitive disentitlement doctrine may be applied to the corporate defendants under the alter-ego theory. It is FURTHER ORDERED that the stay motion is granted as to the corporate defendants until this Court's merits panel renders a decision on the stay motion, as it appears likely that the district court improperly denied the motion to compel arbitration. *Compare Choctaw Generation Ltd., Partnership* v. *Am. Home Ass. Co.*, 271 F.3d 403, 404 (2d Cir. 2001), *with In re Konshita*, 287 F.2d 951, 953 (2d Cir. 1961), and *ACE Capital Re Overseas Ltd.* v. *Central United Life Ins. Co.*, 307 F.3d 24, 34 (2d Cir. 2002).

It is FURTHER ORDERED that the appellants' motion for an expedited appeal is dismissed in its entirety. The following motions are denied as moot: (1) appellees' motion to exceed the twenty-page word limit on appellees' opposition to the appellants' emergency motion for a stay pending appeal; (2) appellees' motion for leave to file accompanying supplemental declaration in support of appellees' opposition to the appellants' emergency motion for stay pending appeal; and (3) appellees' motion to file supplemental declaration in support of appellees' motion to dismiss the appellants' appeal under the fugitive disentitlement doctrine.

FOR THE COURT:
Roseann B. Mackechnie,
Clerk

By: /s/ Lucille Carr

APPENDIX F

UNITED STATES DISTRICT COURT,
SOUTHERN DISTRICT OF NEW YORK

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02 CIV. 666 (JSR)

MOTOROLA CREDIT CORPORATION AND NOKIA CORPORATION, PLAINTIFFS

v.

KEMAL UZAN, ET AL., DEFENDANTS

Sept. 12, 2003

MEMORANDUM ORDER

JED S. RAKOFF, U.S.D.J.

Plaintiffs seek to apply $125,000 of defendants' money currently in plaintiffs' possession toward partial satisfaction of an award of $177,647.59 in attorneys fees and expenses that the Hon. Frank Maas, United States Magistrate Judge, directed be paid to plaintiffs from defendants. *See* Judge Maas's Memorandum Decision dated January 27, 2003 ("January 27 Decision").

The $125,000 was originally advanced to plaintiffs in connection with defendants' request, made first to the undersigned and then to Judge Maas (to whom supervision of much of the discovery in this case was assigned), that certain depositions of the individual defendants occur in Turkey or other suitable locations in Europe rather than in the United States. The $125,000 was intended to defray

plaintiffs' added expenses occasioned by this accommodation. Defendants, however, after numerous delays and broken promises, failed to appear for their depositions and to comply with related discovery orders, failures that Judge Maas determined to have occurred "knowingly and without justification." *See* January 27 Decision at 8. Accordingly, Judge Maas awarded plaintiff Motorola Credit Corporation ("Motorola") $128,411.59 and plaintiff Nokia Corporation ("Nokia") $49,236.00, to compensate them for their time spent preparing for the aborted depositions, as well as for related expenses such as the costs of translating and duplicating documents to be read at the depositions, the costs associated with travel cancellations, etc. *See id.* at 9-13.

Defendants did not appeal Judge Maas's January 27 Decision within the 10 days prescribed by Federal Rule of Civil Procedure 72(a), or, for that matter, thereafter. Accordingly, the January 27 Decision is now final and unappealable, *see id.*, and defendants may not contest on the merits Judge Maas's direction that they pay plaintiffs $177,647.59. Since defendants have not paid any portion of this award, it is entirely appropriate that the $125,000 originally transferred to plaintiffs to defray the costs of taking defendants' depositions should be applied to the costs occasioned by defendants' failure to appear for their depositions, and defendants have failed to raise any colorable argument to the contrary except as respects jurisdiction.

As to jurisdiction, they argue: (1) that this Court has no jurisdiction to consider the instant motion because final judgment in this case, entered on July 31, 2003, is presently on appeal, and (2) that Judge Maas lacked jurisdiction to grant the underlying award embodied in the January 27 Decision because at the time he did so defendants' interlocutory appeal from this Court's refusal to compel arbi-

tration of the claims made in this case was pending in the Court of Appeals.[1]

As to the first argument, it is well-settled that an appeal, even from a final judgment, does not divest the District Court of jurisdiction over essentially collaterally matters such as awarding or collecting attorneys fees and expenses. *See Toliver* v. *County of Sullivan*, 957 F.2d 47, 49 (2d Cir. 1992) (per curiam); *Yurman Designs, Inc.* v. *PAJ Inc.*, 2001 WL 797474, *2 (S.D.N.Y. 2001) ("fee awards are collateral to an underlying judgment (and thus the district court is not divested of jurisdiction to award fees even when a notice of appeal has been filed)"); *Satcom International Group PLC* v. *Orbcomm International Partners, L.P.*, 55 F. Supp. 2d 231, 234 (S.D.N.Y. 1999); *see also Chambers* v. *Time Warner*, No. 00 Civ. 2839, 2003 WL 1107790 (S.D.N.Y., March 12, 2003). Here, the instant application, being collateral to the final judgment and involving collection of

[1] The common use of the term "jurisdiction" in differentiating what aspects of a case, if any, remain with a lower court following various kinds of appeals to a higher court may be somewhat misleading, in that—as suggested by the fact that a party may waive its right to arbitration by participating in extensive pre-trial discovery and motion practice, *see PPG Indus.* v. *Webster Auto Parts Inc.*, 128 F.3d 103, 107 (2d Cir. 1997)—what is frequently involved here is not a question of a court's power or authority but other, prudential considerations. *United States* v. *Rodgers*, 101 F.3d 247, 251 (2d Cir. 1996). As one court has stated, in words applicable here, "[t]he word jurisdiction is popular in the lexicon of lawyers and judges, so popular that its chameleon quality sometimes slips from our grasp .... If one steps out of the fog law books and judicial decisions sometimes generate, however, it should be apparent that the jurisdictional question tendered here is not a question of jurisdiction writ large." *United States* v. *Kember*, 648 F.2d 1354, 1357-58 (D.C. Cir. 1980).

an attorneys fee award that is, as noted, itself unappealable, is properly before this Court.[2]

The second argument—that an interlocutory appeal from a district court's refusal to compel arbitration automatically divests the district court of jurisdiction to proceed with the case—has already been resolved adversely to defendants in this case, not just by this Court but also by the Court of Appeals. It is true that, as a general matter, the Circuit Courts are divided on the extent to which an interlocutory appeal from the denial of compelled arbitration divests a district court of jurisdiction. *Compare Britton* v. *Co-Op Banking Group*, 916 F.2d 1405, 1412 (9th Cir. 1990) (holding there is no divestiture of jurisdiction) *with Bradford-Scott Data Corp., Inc.* v. *Physician Computer Network*, 128 F.3d 504, 507 (7th Cir. 1997) (finding divestiture) *and Bombadier Corp.* v. *National Railroad Passenger Corp.*, 2002 WL 31818924 (D.C. Cir. 2002) (per curiam) (finding divestiture where appeals are non-frivolous). However, the Second Circuit, while not entirely defining its position in this regard, has at least made clear that there are some circumstances where such an appeal does not divest the district court of jurisdiction to continue discovery and, indeed, to proceed to trial. *See In re Salomon Inc. Shareholders' Derivative Litigation*, 68 F.3d 554 (2d Cir. 1995) (affirming district court's decision not to

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[2] The fact that defendants' conduct leading to the January 27 Decision was referred to by this Court in connection with its determination that defendants were in contempt of court, *see* Opinion and Order dated July 31, 2003 ("July 31 Order") at 146-47—a determination that defendants are presently appealing—is irrelevant to the instant motion, which does not depend on any finding of contempt. Also, although the issue of Judge Maas's jurisdiction to proceed with discovery, discussed *infra*, may be before the Court of Appeals for other purposes, that does not prohibit this Court from addressing that issue with respect to a motion that this Court still retains jurisdiction to hear.

stay proceedings pending the appeal but rather to proceed to trial).

What is less clear is what these circumstances are—as well as whether the determination of whether or not such circumstances exist (and whether they are sufficient to warrant the district court's proceeding with the case) is, as *Britton* holds, a "proper subject for the exercise of discretion by the Trial Court." *Britton*, 916 F.2d at 1412. At a minimum, there is no divestiture where the appeal is frivolous. *See Cendant Corporation* v. *Forbes*, 72 F. Supp. 2d 341, 343 (S.D.N.Y. 1999); *Satcom International Group PLC* v. *Orbcomm International Partners, L.P.*, 55 F. Supp. 2d 231, 236 (S.D.N.Y. 1999). But as this Court noted in *Cendant*, the admittedly sparse caselaw in this Circuit suggests that in appropriate cases there may be other considerations that would properly warrant a district court's exercising its discretion to deny a stay of proceedings while an appeal from denial of arbitration is pending—"such as considerations of judicial economy, avoidance of conflicting or piecemeal determinations, and the like." *Cendant*, 72 F. Supp. 2d at 343.

Here, the underlying circumstances strongly favored the Court's exercising its discretion to deny a stay of proceedings. On March 20, 2002, a full two months after the start of this litigation, defendants first moved to compel arbitration. *See* Memorandum of Law in Support of Defendants' Motion to Compel Arbitration, dated March 20, 2002. Although they were not themselves signatories to any arbitration agreement with plaintiffs, defendants sought to compel plaintiffs to arbitrate the instant disputes pursuant to plaintiffs' arbitration agreements with non-party Telsim Mobil Telekomunikayson Hizmetleri A.S. ("Telsim"); but even then, defendants did not formally confirm that they would be bound by any such arbitration until many months later. *See* Transcript of Oral Argument Before the Court of Appeals, dated August 5, 2002, at 38-39. Furthermore,

defendants, once having filed their motion to arbitrate, did not press the District Court for early resolution of that motion or seek to stay proceedings while that motion was *sub judice*. Rather, they not only proceeded with substantial discovery but fully participated in a six-day preliminary injunction hearing directed to the underlying merits, a two-day contempt hearing, and much else. *See* July 31 Order at 45-51 (recounting prior proceedings).

Thereafter, by Opinion dated May 21, 2002, *see id.* at 22-23, by Order dated September 30, 2002, and by Memorandum Order dated October 15, 2002, *see id.* at 6, the Court denied the various permutations of defendants' motion (which chiefly sought to incorporate this lawsuit into certain purported arbitrations, commenced against plaintiffs by Telsim and by certain third parties, that this Court had previously enjoined defendants from pursuing). After appealing the latter two of these orders to the Court of Appeals, defendants then sought from this Court a stay of the entire proceedings pending determination of that appeal. *See* Defendants' Letter dated October 21, 2002. Although this Court, in denying such a stay, held that defendants' appeal (as then cast) was "frivolous," Memorandum Order of October 28, 2002 at 2,[3] it separately

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[3] As the Court later explained in the July 31 Order, at 27-28, its finding in the Memorandum Order of October 28, 2002 that defendants' appeal from the denial of their motion to compel arbitration was "frivolous" was based in part on the fact that many of the transactions on which plaintiffs' RICO claims were predicated—such as the defendants' filing of false criminal charges against plaintiffs' executives—were not conceivably the subject of the arbitration agreements on which defendants sought to rely, *i.e.*, the agreements between plaintiffs and non-party Telsim. Defendants, however, sought arbitration of the entire lawsuit including the RICO claims (which, indeed, were a primary focus of the litigation as it then stood). Later, of course, the Court of Appeals dismissed the RICO claims as unripe. *See Motorola Credit Corp.* v. *Uzan*, 322 F.3d 130, 135 (2d Cir. March 7, 2003). But even if the Court had therefore

determined that, in any event, the proposed stay was part of an improper attempt to derail these proceedings through artificial arbitrations and the like. *Id.* "In such circumstances, a stay would only serve to advance the very machinations for which defendants have previously been found in contempt of court." *Id.*[4]

Read in context, therefore, the Court effectively found that the stay would impede, rather than advance, the interests of judicial economy, a matter that the District Court, in the exercise of its discretion, was in the best position to determine. Indeed, even if the matter had ultimately been referred to arbitration, essentially the same discovery would have had to occur as defendants were at this point willingly undertaking before this Court. Moreover, on September 6, 2002, *i.e.*, shortly prior to seeking the stay, defendants represented to Judge Maas that they intended "to engage totally and move forward" with litigation in this Court. January 27 Decision at 3. Further still, even if the case were ultimately held arbitrable, the Court still retained jurisdiction to issue injunctive relief in aid of arbitration; accordingly it made sense to promptly adjudicate plaintiffs' request for final injunctive relief, which at this point had only been determined preliminarily. Given, as the Second Circuit has noted, that the purpose of any divestiture rule involving interlocutory appeals is to advance efficiency and judicial economy, not impede them,

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considered the stay motion without reference to the aforesaid transactions (which are less central to the non-RICO claims) and had in that altered context deemed the appeal arguably not frivolous, *see* Memorandum Order dated August 8, 2003 at 2, the Court would still have concluded that considerations of judicial economy warranted denial of the stay.

[4] The Court expressly did not reach plaintiffs' still further contention that defendants had waived their right of arbitration, *see* Memorandum Order of October 28, 2002 at 1, but the argument is far from frivolous. *See PPG Indus.*, 128 F.3d at 107.

see Rodgers, 101 F.3d at 251, the situation presented thus required the Court to deny any stay and move forward with the litigation.

In any event, any doubt as to whether the Court could proceed with discovery and trial was then laid to rest by events in the Court of Appeals. Specifically, after this Court denied the stay pending defendants' appeal from the Court's denial of their motion to compel arbitration, the defendants, on November 4, 2002, sought an emergency stay of the lawsuit from the Court of Appeals, *see* Emergency Motion to Stay Pending Appeal of Portions of the District Court's Order of September 30 and Memorandum Order of October 15, 2002, dated November 4, 2002. In their motion, defendants made plain that discovery was proceeding and that the case was firmly set for trial in February, 2003, and sought to stay both discovery and trial. *See* Defendants-Appellants' Memorandum of Law in Support of Their Emergency Motion For: (1) A Stay Pending Appeal of Portions of the District Court's Order of September 30, 2002 and Memorandum Order of October 15, 2002 and (2) An Expedited Appeal at 2. The Court of Appeals, however, declined to rule on the motion, thus allowing the proceedings to continue before this Court. After discovery was completed but before the trial began, defendants thereupon addressed a letter to the Court of Appeals, renewing their application for a stay in light of the pending trial, *see* Letter dated February 5, 2003; but once again the Court of Appeals declined to act. This was in notable contrast, moreover, to action the Court of Appeals had taken with respect to another, interlocutory appeal by defendants, from this Court's enhancement of the fines levied for defendants' contempt of court, where the Court of Appeals had granted a stay of the imposition of the enhanced fines. *See Motorola*, 322 F.3d at 137-38.

For all practical purposes, therefore, the Court of Appeals denied defendants' motion to stay discovery and

the trial. Indeed, both sides, in the continued proceedings before this Court, recognized as much.[5] Thus when the matter came to trial in February, defendants' stated reason for not participating was two Turkish injunctions they had procured (and that were subsequently overturned), not the pending appeal or absence of jurisdiction while it was pending. *See* July 31 Order at 8. Accordingly, here, as in *Britton*, "[w]hatever merit there may have been to [defendants'] request for the court, in the exercise of its discretion, to grant a stay of the district court proceedings pending appellate review of the arbitrability issue, that question was resolved [adversely to defendants] by this court's [*i.e.*, the court of appeals'] refusal to grant the stay." *Britton*, 916 F.2d at 1412 n.8.[6]

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[5] For example, in a pre-trial hearing on January 3, 2003, this Court asked whether it was safe to assume that "the Court of Appeals is fully aware of the trial schedule that this [C]ourt has set, so there is implicit in the whole situation, and especially given the various requests for emergency relief that [were] made at various times by the defendants, a basis on which this Court can with some confidence move forward . . . ." Transcript of January 3, 2003, at 17. To this query, plaintiffs' counsel responded that "the Court of Appeals absolutely knows because the defendants used [as a primary argument for a stay] . . . the imminence of the trial date before the [C]ourt. Yes, your Honor, the Court of Appeals is fully aware of where this case has been and the trial date that has been set in this case." *Id.* at 18. The defendants, tellingly, offered no contrary argumentation or evidence, so this Court justifiably relied on the Court of Appeals' failure to grant defendants' proposed stay in making its determination to proceed to trial.

[6] As to the trial, moreover, it may be noted that no verdict was rendered until after the Court of Appeals remanded the case, for all purposes, in March, 2003 and after the Turkish appeals court reversed the aforesaid injunctions. Further still, when the Court rendered its trial verdict, it explicitly based that decision primarily on the evidence that had been presented at the time of the preliminary injunction hearing, well before the defendants filed their interlocutory appeal. *See* August 8 Order at 5-6.

In sum, it is clear that the Court had jurisdiction when Judge Maas issued his order and has it now. Accordingly, the plaintiffs' request to apply the $125,000 of defendants' money currently in plaintiffs' possession to the fees and expenses that Judge Maas awarded them in the January 27 Order is hereby granted.[7]

SO ORDERED

/s/
JED S. RAKOFF, U.S.D.J.

[7] Plaintiffs presumably can resolve between themselves how much of the $125,000 should be applied to what each is separately due under the January 27 Decision, but should then inform the Court and defendants of that allocation.

APPENDIX G

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Docket Nos. 03-7792(L), 02-7566, 02-9302

MOTOROLA CREDIT CORPORATION AND NOKIA CORPORATION, PLAINTIFFS-APPELLEES

v.

KEMAL UZAN, ET AL., DEFENDANTS-APPELLANTS

[Filed: August 18, 2003]

BEFORE: HON. JOSE A. CABRANES, Circuit Judge.

Following referral of this motion for a stay to me on an emergency basis by Chief Judge John M. Walker, Jr., in the mid-afternoon of Friday, August 15, 2003, and a telephone conference with counsel for affected parties held on the record later that afternoon, the motion for a stay was GRANTED. Upon further consideration, the motion is hereby referred to the three-judge motions panel of the Court sitting during the week of August 18, 2003, and the stay I entered on August 15, 2003 shall remain in full force and effect until that motions panel enters an order embodying its decision on the motion for a stay. The court reporter is directed to file with the Clerk of Court, and serve on all counsel of record and on me at my New Haven, CT chambers, a transcript of the telephone conference hearing of August 15, 2003 by no later than 12 noon on Wednesday, August 20, 2003.

This order supersedes the orders stated orally and on the record on Friday, August 15, 2003.

It is so ordered.

FOR THE COURT:
Roseann B. Mackechnie,
Clerk

By: /s/
Laura Bass Penn,
Motions Staff Attorney

APPENDIX H

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

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02 CIV 666 (JSR)

MOTOROLA CREDIT CORPORATION AND NOKIA CORPORATION, PLAINTIFFS

v.

KEMAL UZAN, ET AL., DEFENDANTS

June 31, 2003
As Corrected August 8, 2003

OPINION and ORDER

RAKOFF, District Judge:

As the Court of Appeals has noted, "[t]his case raises a host of unusual [legal] questions . . . ." *Motorola Credit Corporation* v. *Uzan*, 322 F.3d 130, 134 (2d Cir. 2003). Part I of this Opinion and Order resolves such of those questions as are presently ripe for decision. No legal thicket, however, can hide the fact that all the credible evidence before the Court proves that the defendants—in particular, the members of the Uzan family—have perpetrated a huge fraud. Under the guise of obtaining financing for a Turkish telecommunications company, the Uzans have siphoned more than a billion dollars of plaintiffs' money into their own pockets and into the coffers of other entities they control. Having fraudulently induced the loans, they have sought to advance and conceal their scheme through an almost endless series of lies, threats,

and chicanery, including, among much else, filing false criminal charges against high level American and Finnish executives, grossly diluting and weakening the collateral for the loans, and repeatedly disobeying the orders of this Court. Part II of this Opinion and Order details the overwhelming evidence of this misconduct and the legal consequences that flow therefrom, including, among much else, an award of damages in excess of $4 billion and an order for the arrest and confinement of the individual defendants should they be brought within the jurisdiction of the Court.

Before turning to any of this, however, a brief background is in order. Plaintiff Motorola Credit Corporation ("MCC") is the financing affiliate of Motorola, Inc., a major provider of telecommunications equipment and services. Co-plaintiff Nokia Corporation ("Nokia") is another major telecommunications manufacturer. Nokia's financial arrangements, so far as here relevant, were handled through the Stockholm Branch of ABN-AMRO Bank N.V. ("ABN-AMRO Bank").

The defendants are the five leading members of the Uzan family, namely Kemal Uzan, Cem Cengiz Uzan, Murat Hakan Uzan, Melahat Uzan, and Aysegul Akay (collectively, the "Uzans"), their associate Antonio Luna Betancourt, and three Uzan-controlled companies, namely, Unikom Iletism Hizmetleri Pazarlama A.S., Standart Pazarlama A.S., and Standart Telekomunikasyon Bilgisayar Hizmetleri A.S. ("Standart Telekom"). Directly or indirectly, the Uzans—reputedly among the richest families in the world, *see, e.g.*, L. Kroll, *The World's Billionaires*, FORBES, Feb. 28, 2002—also control more than 130 other companies, including, of particular relevance here, a telecommunications company named Telsim Mobil Telekomunikayson Hizmetleri A.S. ("Telsim").

Between April 1998 and September 2000, the Uzans fraudulently induced MCC and Nokia to transfer to Telsim

approximately $2.7 billion, supposedly to finance a major expansion of Telsim's operations. Actually, however, the Uzans intended to divert a large part of these funds to other entities they controlled and to their own pockets, so as to fund their economic empire and to pay for such personal items as private airplanes, yachts, helicopters, and multi-million dollar apartments in New York and elsewhere. Although defendants' refusal to provide much of the Court-ordered discovery leaves uncertain the full extent of the fraudulent diversion, it amounts at least to $1 billion, involving the direct transfer of $450 million from Telsim to other Uzan-controlled entities in Turkey, a separate diversion of $133 million from Telsim to certain Uzan-controlled entities in the Netherlands Antilles, and still another $552 million diversion through the device of inflated "Telsim" expenses payable to Uzan-controlled entities. Ultimately, it appears that as much as $300 million found its way into the Uzans' personal bank accounts.

Plaintiffs were slower to uncover this fraud than they otherwise might have been because the defendants provided them with false financial information about Telsim, because the defendants falsely represented that further financing from third parties was imminent, and, most especially, because the plaintiffs thought they were protected by substantial collateral. Specifically, the Uzans had arranged for still another of their companies, Rumeli Telefon Sistemleri A.S. ("Rumeli Telefon"), which at that time owned about three-quarters of Telsim's outstanding shares, to pledge virtually all those shares to the plaintiffs as collateral for the plaintiffs' loans to Telsim. But in April 2001, the Uzans, knowing that they could no longer stave off default, convened a secret meeting of Telsim's shareholders at which they diluted the economic value of Rumeli Telefon's shares in Telsim to a third of what it had previously been and transferred majority control of Telsim from Rumeli Telefon to Standart Telekom. A few months later,

at another secret meeting, they stripped the remaining collateral of its voting rights and took other steps to further diminish its value.

Meanwhile, plaintiffs, having finally declared Telsim in default, sent financial investigators to Turkey to try to uncover the truth. The Uzans retaliated by filing criminal complaints against high ranking executives of Nokia, Motorola, Inc., and Motorola Turkey (Motorola, Inc.'s local affiliate), falsely charging the executives with threatening to kill the Uzans. But, despite these and other impediments, plaintiffs eventually uncovered enough evidence of the fraud to commence the instant lawsuit.

The complaint, filed in January, 2002, charged the defendants with federal acts of racketeering, state claims of fraud, and other serious misconduct. Early in the case, the Court issued injunctive relief for the purpose of maintaining the status quo, including the preservation of what little was left of the collateral. But, the defendants contemptuously refused to obey the Court's orders, in one case even breaking their sworn promise not to further eviscerate the collateral. The defendants also repeatedly reneged on promises to provide discovery ordered by Magistrate Judge Maas (to whom certain aspects of the pre-trial preparation of the case were assigned), and instructed their counsel not to reveal to this Court or the Court of Appeals secret steps they were taking in Turkey to obtain *ex parte* orders undercutting the prior orders of this Court. Additionally, the defendants, though not themselves parties to any arbitration agreement with either of the plaintiffs, demanded that the instant disputes be submitted to Swiss arbitration pursuant to arbitration agreements between Telsim and MCC and between Telsim and ABN-AMRO Bank.

Notwithstanding these difficulties, the Court conducted two evidentiary hearings and a trial, at which the aforementioned facts, and much else, were established.

Subsequent to the trial, however, the Court of Appeals, to which the defendants had appealed from the Court's preliminary injunction order, determined that those of plaintiffs' claims brought under the Racketeer Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. § 1961 *et seq.*, must be dismissed as unripe—without prejudice, however, to their being reinstated when they become ripe. Since several of this Court's orders were premised, at least in part, on the viability of the RICO claims, the Court of Appeals remanded so that this Court could reconsider its prior rulings in light of this development. Thereupon, this Court, while dismissing the RICO claims (without prejudice), in accordance with the mandate of the Court of Appeals, *see* Order, dated April 3, 2003, invited motion practice on all issues implicated by the Court of Appeals' decision or otherwise preliminary to any final determination of the underlying claims. Having received extensive submissions on these matters, the Court now adjudicates these motions in Part I of this Opinion and Order.

I. The Motions

The motions presently pending before the Court are resolved as follows:

1. Plaintiffs' motion to preclude defendants (on grounds of waiver and the like) from further contesting any disputed matter in this case is denied as to jurisdictional matters and those legal disputes that reasonably could not have been expected to be raised except in the new posture of the case created by the Court of Appeals' decision, but is otherwise granted.

2. Plaintiffs' motion to supplement the Complaint to reinstate the RICO claims is denied, without prejudice to those claims being reinstated when the contractual remedies have been exhausted.

3. Defendants' motion to dismiss for lack of standing MCC's four claims relating to computer hacking, *viz.*, Counts VIII-XI of the Complaint, is granted.

4. Plaintiffs' motion requesting the Court to retain supplemental jurisdiction over plaintiffs' remaining state claims is granted.

5. Defendants' motion to dismiss MCC's claims under Illinois law alleging common law fraud, promissory fraud, and civil conspiracy is denied.

6. MCC's motion to amend its complaint to assert a claim under Illinois law for impairment of collateral is denied as moot.

7. Plaintiffs' motion to extend their constructive trust claim to apply to certain property in New York is denied.

8. Defendants' motion to dismiss on grounds of *forum non conveniens* is denied.

9. Defendants' renewed motion to compel arbitration is denied.

10. Defendants' motion to dissolve the Court's preliminary injunction and attachment orders and to void all related findings of contempt is denied.

11. Defendants' motion to dissolve the Court's order enjoining defendants from pursuing certain Swiss arbitrations is granted.

12. Plaintiffs' motion for a further finding of civil contempt against defendants based on defendants' failure to comply with the Court's Memorandum Order dated January 6, 2003 is granted.

13. Plaintiffs' motion for attorneys' fees and expenses as prevailing plaintiffs under RICO, 18 U.S.C. § 1964(c), is denied without prejudice, and MCC's motion for attorneys' fees and expenses as prevailing party on its computer hacking claims, *see* 18 U.S.C. §§ 2520, 2711, is denied with prejudice.

14. The motion of non-party HSBC Mortgage Corporation (USA) to modify certain aspects of the Court's prior orders of attachment is granted.

The reasons for the Court's deciding these motions as indicated above are as follows:

As to the first motion, plaintiffs move to preclude defendant from further contesting any disputed matters in this case (including those matters implicated by the Court of Appeals' decision), on the ground that defendants, by expressly refusing to attend or participate in the trial of this case that commenced on February 19, 2003, waived, forfeited, or otherwise irretrievably lost their right to participate further in the case or to contest any issue therein. To some extent, this issue is addressed to the sound discretion of the Court, albeit informed by such considerations as whether defendants' alleged waiver was intentional, whether plaintiffs' would suffer prejudice if defendants were allowed to belatedly raise otherwise waived issues, etc. Here, the duplicitous "gamesmanship" practiced by defendants in this case makes it an appropriate situation for the application of doctrines of waiver and the like.

For example, while conceding at the outset that the Court had personal jurisdiction over Cem Uzan, his counsel refused to make him available to testify for his deposition, at the preliminary injunction hearing, or at trial, invoking different, but equally frivolous, excuses on each occasion. Or, to give another example (of many), after the Uzans brought in their own separate counsel and, through him, unequivocally represented to Magistrate Judge Maas that they intended to provide previously-ordered discovery and litigate the case on the merits, *see Motorola Credit Corp.* v. *Uzan*, 02 Civ. 666 (JSR) (FM), 2003 WL 203011, at *2 (S.D.N.Y. Jan. 29, 2003), they then secretly procured *ex parte* Turkish injunctions that purported to prohibit them

from fulfilling these very promises, *see* Order, dated January 6, 2003, 2003 WL 56998 at *2-3.

In such circumstances, when defendants, invoking the same specious self-procured injunctions, refused to participate in the long-scheduled trial of this case, *see* Defendants' Statement of Intention Regarding the Trial Scheduled for February 10, 2003, dated January 24, 2003, the Court would have been well within its rights to have simply issued a default judgment in plaintiffs' favor. Instead, taking account of such factors as the size and significance of the case, plaintiffs' expensive preparations for trial, the availability of the proof developed at the six-day evidentiary hearing and the two-day contempt hearing that the defendants *had* contested, and the benefit to any reviewing court of detailed findings of fact and conclusions of law, the Court proceeded with the trial. The findings and conclusions resulting therefrom, so far as they relate to remaining claims, appear in Part II of this Opinion and Order.

Under the circumstances, defendants are plainly precluded by the most elementary principles of waiver from further litigating any factual disputes they could reasonably have raised at trial, as well as any waivable legal issues not otherwise preserved that could have been raised at trial or earlier. On the other hand, there are certain issues that can never be waived, such as subject matter jurisdiction and standing. *See FW/PBS, Inc.* v. *City of Dallas*, 493 U.S. 215, 231 (1990) ("The federal courts are under an independent obligation to examine their own jurisdiction."). Also, if there are legal issues that, though waivable in principle, have previously been fully preserved or that could not reasonably have been expected to be raised until after the trial (notably, those issues that only became salient as a result of the Court of Appeals' decision), those issues may still be litigated and are considered below.

As to the second motion, plaintiffs' move, pursuant to Fed. R. Civ. P. 15(d), to file a supplemental complaint reinstating their RICO claims.

In dismissing plaintiffs' RICO claims, the Court of Appeals found here applicable the holding of *First Nationwide Bank* v. *Gelt Funding Corp.*, 27 F.3d 763 (2d Cir. 1994), that "'a plaintiff who claims that a debt is uncollectible because of the defendant's conduct can only pursue the RICO treble damages remedy after his contractual rights to payment have been frustrated.'" *Motorola*, 322 F.3d at 136, *quoting First Nationwide*, 27 F.3d at 768.[1] The Court found that because plaintiffs, though declaring Telsim in default, had not yet pursued all their contractual remedies against Telsim, including foreclosing on the collateral and seeking damages from Telsim through Swiss arbitration, the extent of their RICO damages was uncertain and their RICO claims were therefore premature at this time. *See Motorola*, 322 F.3d at 136.

In now seeking to reinstate their RICO claims, plaintiffs contend that pursuing their contractual remedies any further would be futile because there is no "real possibility that the debt, and therefore the injury, may be eliminated or significantly reduced," *Motorola*, 322 F.3d at 136, either by foreclosure on the collateral or by resort to other contractual remedies. This argument is far from frivolous. As to the collateral, defendants have not only, as noted, significantly diluted its value, but also have effectively stripped it of its voting, auditing, and management control rights. Specifically, after the defendants, in April 2001, had diluted the value of the collateral to one-third of what it had

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[1] Other circuits have disagreed with *First Nationwide*, either implicitly, *see Isaak* v. *Trumbull Savings & Loan Co.*, 169 F.3d 390, 396-98 (6th Cir. 1999), or explicitly, *see Grimmett* v. *Brown*, 75 F.3d 506, 516-17 (9th Cir. 1996).

been, the defendants, on January 4, 2002, held another unannounced meeting of Telsim's shareholders at which they caused Telsim to enact certain resolutions that, upon being registered with the Turkish government, would create a new class of Uzan-controlled shares, unencumbered by any pledge to MCC or Nokia, the holders of which would have authority to nominate four of Telsim's five directors and all three of Telsim's statutory auditors. The resolutions also permitted Telsim to become a member of certain Turkish "foundations," the assets of which are largely protected from creditors. In direct defiance of this Court's preliminary injunction order, as well as their own express promise to the Court, the defendants then registered these resolutions with the Turkish authorities on July 19, 2002. *See* Opinion, dated May 20, 2002, 202 F. Supp. 2d 239, 248 & n.4; Opinion and Order, dated August 22, 2002, 2002 WL 1963301 at 2-4.

Moreover, defendants have repeatedly resisted, and gone into contempt of, this Court's orders to transfer the collateral (or its functional equivalent) to the registry of this Court so that it could be used to satisfy any judgment. They have also declined the proffered alternative of posting a bond in lieu of the collateral, preferring to remain in contempt. *See e.g.*, Opinion and Order, dated August 22, 2002 (holding all defendants in civil contempt for failing to deposit the collateral with the Court and the individual defendants in civil contempt for registering the January 4 Resolutions); Order, dated October 15, 2002 (enhancing contempt sanctions); Memorandum Order, dated October 15, 2002, 2002 WL 31319932 at *4 & n.1 (finding that defendants commenced Swiss arbitrations "in an effort to undercut the prior orders of, and proceedings before, this Court"); Memorandum Order, dated January 7, 2003, 2003 WL 56998 (discussing defendants' procurement of Turkish injunctions purporting to stay the instant action in

contravention of this Court's September 30 and October 15 Orders).

But the fact that the value of the collateral has been hugely diminished and made more difficult to realize does not make it worthless. Indeed, even after July 19, 2002, plaintiffs repeatedly sought to have the collateral, or some equivalent thereof,[2] moved to the registry of the Court on the basis that it could be used to help materially satisfy any judgment rendered in their favor. *See* Plaintiffs' Memorandum of Law in Support of their Motion for a Preliminary Injunction, dated January 28, 2001, at 27-28. Moreover, defendants, while contemptuously resisting transfer of the shares to this Court, have represented that they will seek permission from the Turkish courts to transfer the collateral, or its equivalent, to the Swiss arbitrations. *See* Transcript, dated June 21, 2002 at 194.

Nonetheless, if it were only a question of the collateral, the Court might well agree with plaintiffs that there is no "real possibility" that it will ever be made available to "significantly" reduce defendants' conceded debt to plaintiffs of more than $2.7 billion. But under their contracts with Telsim, MCC and ABN-AMRO Bank (on behalf of Nokia) can seek a judgment for damages against Telsim, to which it appears that Telsim's only defense is its claim of "economic *force majeure*." While ABN-AMRO Bank commenced such an arbitration shortly prior to the filing of this lawsuit, it does not appear to have pursued it aggressively; and MCC has not pursued arbitration at all, so this remedy has not been put to the test.

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[2] In lieu of their actual collateral, plaintiffs requested that the Court require defendants to deposit into the Court's registry the Telsim shares issued to Standart Telekom as part of the April dilution. *See* Plaintiffs' Memorandum of Law in Support of their Motion for a Preliminary Injunction, dated January 28, 2001, 2003 WL 203011 at 3.

In any event, the Court of Appeals implicitly anticipated the argument plaintiffs here make, noting that "[i]t may be that the arbitration is a forlorn hope for MCC and Nokia, and that, in any event, the collateral will yield little of value." *Motorola*, 322 F.3d at 137. Yet even after countenancing this possibility, the Court of Appeals dismissed the RICO claims as being premature until the contractual remedies were exhausted. It follows that, this precondition being still unmet, plaintiffs' motion to reinstate the RICO claims must be denied (though, once again, without prejudice).

As to the third motion, defendants move to dismiss MCC's various claims alleging so-called "computer hacking," specifically, Count VIII (alleging violations of the Computer Fraud and Abuse Act, 18 U.S.C. § 1030(A)(4)), Counts IX and X (alleging violation of the Electronic Communications Privacy Act, 18 U.S.C. §§ 2511(1)(A), 2701(A)(2)), and Count XI (alleging violation of the Illinois Trade Secrets Act, 765 ILCS Ch. 1065), on the ground that the only injury, if any, that resulted from the alleged hacking was an injury to Motorola, Inc., not to MCC. While, given their affiliated status, it may be that Motorola, Inc. and MCC can be conflated or viewed as agents of one another for certain evidentiary and other purposes, when it comes to bringing a claim the corporate forms must be respected and, absent an assignment or the like (not present here), only a company that itself suffered an injury can sue on that claim. *See, e.g., Bross Utils. Serv. Corp.* v. *Aboubshait*, 618 F. Supp. 1442, 1445 (S.D.N.Y. 1985) ("[C]ourts will not allow a *parent* to pierce the corporate veil it created for its own benefit, so as to assert the claims of its subsidiary.") (emphasis in original). Here, defendants are correct that the evidence adduced by MCC on these charges shows only that an attempt was made to gain access to a server belonging to Motorola, Inc., not MCC; that proprietary information was copied from a database

belonging to Motorola, Inc., not MCC; and that only Motorola, Inc., not MCC, expended funds in investigating the aforementioned incidents. *See* Plaintiffs' Trial Exhibit ("PT")-458 (Allan Baxter testimony at preliminary injunction hearing) at 369-373, 384-386; PT-460 (Declaration of Ian Menzies dated February 7, 2003) at 2-6. While MCC argues that it made use of Motorola, Inc.'s computer network, *see* Transcript, dated February 19, 2003 (Ian Stuart Menzies testimony at trial) at 82; Plaintiffs' Memorandum of Law in Opposition to Defendants' Motions of April 4, 2003, dated April 24, 2003, at 64, it has adduced no evidence that any communication to or from MCC was actually intercepted. Similarly, while MCC argues that the contact list of customers that was copied "naturally included customers of [MCC]," *id.*, it has adduced no admissible evidence to sustain this inference.

MCC's strongest response, however, is that defendants waived the instant objection by not raising it at or before trial. Thus, for example, if defendants were asserting that MCC was not the real party in interest, *see* Fed. R. Civ. P. 17(a), failure to raise this defense before trial would normally constitute waiver of the defense. *See, e.g., United HealthCare Corp.* v. *Am. Trade Ins. Co.*, 88 F.3d 563, 569 (8th Cir. 1996) ("Because the requirements in Rule 17(a) are for the benefit of the defendant, we have held that an objection on real party in interest grounds should be raised with reasonable promptness in the trial court proceedings. If not raised in a timely or seasonable fashion, the general rule is that the objection is deemed waived.") (internal quotation marks omitted); *Whelan* v. *Abell*, 953 F.2d 663, 672 (D.C. Cir. 1992) ("[W]here a *Rule 17(a)* defense is made, judges abuse their discretion in allowing the plea as late as the start of the trial if the real party has been prejudiced by the defendant's laxness."); *see also Gogolin & Stelter* v. *Karn's Auto Imports, Inc.*, 886 F.2d 100, 102 (5th Cir. 1989); *K-B Trucking Co.* v. *Riss Int'l Corp.*, 763 F.2d

1148, 1153 n.2 (10th Cir. 1985); *Rosenblum* v. *Dingfelder*, 111 F.2d 406, 407 (2d Cir. 1940).[3]

But here the objection is more in the nature of an objection to MCC's standing. It is not as if MCC believed it stood in the shoes of Motorola, Inc., but was mistaken in this belief, a classic situation for the application of Rule 17(a).[4] *See, e.g., Del Re* v. *Prudential Lines, Inc.*, 669 F.2d 93, 96-97 (2d Cir. 1982) (declining to allow Rule 17(a) ratification where "no difficulty, confusion or mistake ever existed . . . regarding the identity of the party in whose name the suit must be brought"). Rather, MCC has at all times asserted that it is suing on its own behalf, but it has proven unable to adduce anywhere that, as such, it suffered any injury from the alleged computer hacking. It therefore lacks standing to bring these claims, a failure that is jurisdictional in nature and therefore unwaivable. *See Thompson* v. *County of Franklin*, 15 F.3d 245, 248 (2d Cir. 1994).[5] Accordingly, Counts VIII through XI are hereby dismissed.

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[3] Relatedly, even if such a defense were not waived, the objection could be cured, short of dismissal, by ratification, joinder, or substitution of the real party in interest. *See* Fed. R. Civ. P. 17(a).

[4] Indeed, MCC does not even refer to Rule 17(a) anywhere in its papers.

[5] Since the objection is to lack of standing, rather than failure to name the real party in interest, the savings provisions of Rule 17(a) have no application. *See Zurich Ins. Co.* v. *Logitrans Inc.*, 297 F.3d 528, 531 (6th Cir. 2002). Plaintiffs' related argument that the objection is really to lack of capacity under Rules 17(b) and 9(a), and therefore waivable, is without merit. As the court explained in *Felson* v. *Miller*, 674 F. Supp. 975, 977 (E.D.N.Y. 1987):

> The differences between standing and capacity can easily be illustrated. An infant alleging personal injury would lack capacity but would satisfy the standing requirement. A competent adult failing to allege an interest in a claim would lack standing, but have capacity to sue.

As to the fourth motion, given that all federal claims have now been dismissed (albeit without prejudice in the case of the RICO claims), plaintiffs move for the Court to retain supplemental jurisdiction over the remaining state claims, *i.e.*, MCC's claims under Illinois law for common law fraud, promissory fraud, and civil conspiracy, and MCC's and Nokia's joint claim (under New York law, *see infra*) for imposition of a constructive trust.

As a threshold matter, a district court can retain supplemental jurisdiction over state claims following dismissal of all federal claims only if it had original jurisdiction over some or all of the now-dismissed federal claims. Since the federal claims (*i.e.*, the RICO claims and three of the computer hacking claims) were dismissed for lack of standing, defendants argue that the Court never had original jurisdiction over those claims. But in the case of the RICO claims, dismissal was without prejudice precisely because what was lacking was not original jurisdiction but rather a failure to satisfy a further, judicially-created requirement that a plaintiff not bring a RICO suit until he has exhausted his contractual remedies and thereby clearly and definitely ascertained his RICO damages. *Motorola*, 322 F.3d at 135. As the Court of Appeals, in contrasting the higher RICO standard of causation with the lower constitutional standard, recently held in *Lerner* v. *Fleet Bank, N.A.*, 318 F.3d 113, 117 (2d Cir. 2003), "RICO standing is not a jurisdictional prerequisite the absence of which would divest the district court of the original jurisdiction required to support supplemental jurisdiction." Similarly here, although plaintiffs have not satisfied the prerequisite of RICO standing that their injuries be "clear and definite," they have met the lower constitutional standing threshold

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Id. Here the objection is that MCC suffered no injury to itself from the alleged computer hacking. Hence, the objection is to lack of standing.

of alleging injuries that are "'distinct and palpable,'" *see Matter of Appointment of Indep. Counsel*, 766 F.2d 70, 73 (2d Cir. 1985), citing *Gladstone Realtors* v. *Vill. of Bellwood*, 441 U.S. 91, 100 (1979). That is all that is required for original jurisdiction.

Since, therefore, the Court had original jurisdiction over the RICO claims that it has now dismissed, it may, but is not required to, continue to exercise supplemental jurisdiction over the state claims. 28 U.S.C. § 1367(c). Apart from the dismissal of the federal claims, none of the statutory reasons for declining supplemental jurisdiction in such circumstances is present here: the state claims do not raise novel or complex issues of state law; the state claims do not substantially predominate over the now-dismissed but potentially-reinstatable federal claims; and no exceptional circumstances compel the Court to decline to exercise supplemental jurisdiction. *Id.*

Numerous factors, however, weigh in favor of the Court's retaining supplemental jurisdiction here, including such classic factors as "considerations of judicial economy, convenience, and fairness to litigants," *see Purgess* v. *Sharrock*, 33 F.3d 134, 138 (2d Cir. 1994). Indeed, with respect to judicial economy, this is a particularly strong case for retaining supplemental jurisdiction, since the Court has not only spent considerable time dealing with the legal issues and becoming fully conversant with the facts but also has conducted a trial on the merits, so that it is in the position to promptly enter final judgment on the supplemental claims (*see* Part II *infra*). Moreover, if the Court were to decline supplemental jurisdiction, plaintiffs might be deprived of the previously-granted injunctive relief, without which they would suffer irreparable injury. *See* Orders, dated May 9 and May 10, 2002 (granting plaintiffs' preliminary relief); Opinion, dated May 21, 2002 (setting forth the reasons for the May 9 and May 10 Orders); *see also* Supplemental Order of Attachment, dated January 3,

2003; Supplemental Order of Attachment, dated November 14, 2002; Order, dated August 29, 2002.

Accordingly, plaintiffs' motion to have the Court retain supplemental jurisdiction over the remaining state claims is hereby granted.

As to the fifth motion, defendants move to dismiss MCC's state law claims for common law fraud, promissory fraud, and civil conspiracy. Defendants argue that, as in the case of the RICO claims, these Illinois claims are unripe for adjudication because, until the contractual remedies are exhausted, the extent of damages remains uncertain.

But the Illinois law of fraud recognizes no equivalent of the Second Circuit's stringent rule that denies RICO standing unless contractual remedies are exhausted and the calculation of the remaining damages is clear and definite. Rather, as in most states, Illinois allows fraudulent inducement and extrinsic fraud claims to proceed even where contractual remedies may be available and requires only that the damages not be so speculative as to leave in doubt whether plaintiff has been materially harmed at all.

The case on which defendants here primarily rely, *City of Chicago* v. *Mich. Beach Hous. Coop.*, 696 N.E.2d 804 (1998), is simply an example of such extreme speculativeness that casts even the fact of injury in substantial doubt. In that case, the court rejected the City of Chicago's argument that it had been damaged by defendant's misrepresentation that a loan from the city to defendant would be used to transform low-income rental housing into a cooperative when instead defendant simply intended to use the funds to subsidize the low-income housing. The Court explained:

> The city argues that even though the loan is not yet in default, it has been injured by defendants' inability to pay and the increased risk to the city's investment. But we can only speculate about whether the loan will

> be repaid when it becomes due after 42 years, or whether the building's use as rental housing makes the investment "riskier."

Id. 231 Ill. Dec. 508, 696 N.E.2d at 810. In other words, the action was dismissed because it was unclear whether plaintiff had been placed at greater risk than it had bargained for or that it had suffered any economic injury at all.

Here, by contrast, MCC has clearly been placed at greater risk by, among other thing, the fraudulent diversion of no less than $1 billion of the loaned monies away from the company they were lent to and into the hands of the defendants and by the huge (and measurable) decline in the value of the fraudulently impaired collateral. Thus, so far as the Illinois fraud claims are concerned, the case is governed by decisions like *Application of Busse*, 464 N.E.2d 651 (1984). There, the court held that defendants' impairment of the value of plaintiff's bargained-for collateral constituted "sufficient proof of actual damages to sustain an action for fraud," even though the debtor had not yet defaulted on the underlying loan. *Id.* 79 Ill. Dec. 747, 464 N.E.2d at 658.[6] As the Court there stated, "while damages may not be predicated on mere speculation, hypothesis, conjecture or whim, absolute certainty concerning the amount of damage is not necessary to justify a recovery where the existence of damage is established; the evidence need only tend to show a basis for computation of damages with a fair degree of probability." *Id.* 79 Ill. Dec.

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[6] Here, of course, MCC claims that Telsim has defaulted but defendants claim that the default is excused by "economic *force majeure*." As *Busse*, 79 Ill. Dec. 747, 464 N.E.2d at 657, illustrates, however, even where no default whatever has yet occurred, Illinois law allows recovery for, among other things, the heightened risk that defendants' fraud has imposed.

747, 464 N.E.2d at 655. *See also Mich. Beach Hous. Coop.*, 231 Ill. Dec. 508, 696 N.E.2d at 809.

In the instant case, where, as a result of the defendants' fraudulent looting of Telsim, that company has defaulted on its loan repayments and proven unable to repay more than a tiny fraction of the loans, and where, as a result of the defendants' fraudulent diluting of the collateral, the collateral's value is, at best, a small fraction of what is owed on the loan, plaintiffs have more than made out a basis for bringing suit under Illinois law. The fact that Telsim may have quasi-contractual defenses to the default ("economic *force majeure*") or that the collateral, though of ascertainable value, has not yet been foreclosed upon are matters that the defendants may raise as affirmative defenses or in mitigation of damages, but they do not, under Illinois law, preclude plaintiffs from bringing suit.

Where, moreover, the loan was fraudulently induced, Illinois law, in a principle established as early as 1886 permits (though does not require) recovery of the full amount of the loan, plus interest, *see Horne* v. *Walton*, 117 Ill. 141, 7 N.E. 103, 104 (1886); *see also Busse*, 79 Ill. Dec. 747, 464 N.E.2d at 658-59, putting the burden on the borrower to prove any reductions, set off, or mitigation, *see Commercial Nat'l Bank of Peoria* v. *Fed. Deposit Ins. Corp.*, 131 Ill. App. 3d 977, 87 Ill. Dec. 107, 476 N.E.2d 809, 813 (1985).

More generally, while the Second Circuit in *First Nationwide*, 27 F.3d at 768, suggested that "[t]he general rule of fraud damages is that the defrauded plaintiff may recover out-of-pocket losses caused by the fraud," *id.*,[7]

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[7] In support of this proposition, the Court of Appeals cited a single case *Disher* v. *Info. Res., Inc.*, 691 F. Supp. 75, 79 (N.D. Ill. 1988), but *Disher* states only that a plaintiff in a federal securities fraud case is not entitled to recovery where he has not suffered any economic loss but has instead profited on the securities transaction

Illinois law is both broader and more flexible. As surveyed at some length in *Giammanco* v. *Giammanco*, 625 N.E.2d 990 (1993), fraud damages in Illinois are most commonly calculated by a benefit-of-a-bargain approach, occasionally by an out-of-pocket approach, and sometimes by still other approaches. *Id.* 192 Ill. Dec. 835, 625 N.E.2d at 998-1001. The common denominator is to try to fashion, if at all possible, a remedy in damages for a victim of an intentional fraud, *id.*, especially where (as here) the defendant's wrongful conduct has made it difficult to establish the measure of the plaintiff's injury, *Fed. Deposit Ins. Corp.* v. *W.R. Grace & Co.*, 877 F.2d 614, 624 (7th Cir. 1989) (applying Illinois law).

Furthermore, regardless of the measure of compensatory damages, a defrauded plaintiff may also be entitled to punitive damages under Illinois law. *See Busse*, 79 Ill. Dec. 747, 464 N.E.2d at 655; *Fed. Deposit Ins. Corp.*, 877 F.2d at 623.

A few examples will illustrate how courts have applied these flexible principles of Illinois fraud law to situations similar to the present case:

In *Horne*, 7 N.E. at 103-04—the seminal Illinois decision in this area—where a loan was induced by fraudulent misrepresentations regarding the value of the collateral, the Supreme Court of Illinois rejected the lower court's conclusion that the plaintiff was only entitled to recover the difference between the value of the collateral as rep-

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notwithstanding the fraud. In *Astor Chauffeured Limousine Co.* v. *Runnfeldt Investment Corp.*, 910 F.2d 1540 (7th Cir. 1990), the court explained that the rationale for this measure of damages is rooted in the federal securities laws, *id.* at 1551, *see, e.g.*, *Levine* v. *Seilon, Inc.*, 439 F.2d 328 (2d Cir. 1971), and went on to note: "State law may be another matter . . . . [Plaintiff] has not discussed state law, but our research indicates that Illinois follows the benefit of the bargain approach in asset cases." *Id.* at 1552. *Accord*, Restatement (Second) Torts § 549(2) cm. g (1977).

resented and its actual worth, and held instead that she was entitled to recover the full amount of her loan plus interest. *Id.*

In *Fed. Deposit Ins. Corp.*, 877 F.2d at 623, applying Illinois law to a case where defendant fraudulently induced plaintiff to lend it $75 million allegedly to develop natural-gas fields that the defendant knew were worthless, but where no default had occurred, Judge Posner (with typical creativity) held that the measure of damages was the total amount the plaintiff could have made by investing the loaned money elsewhere minus the sum of the interest already received on the loan and the remaining value of the actual loan as determined by discounting its face value by the percentage of unlikelihood it would be repaid—a measure that, whatever its conceptual merits, obviously involved some considerable guesswork. In addition, the Court of Appeals upheld the jury's award of $25 million dollars in punitive damages above its award of $25 million in compensatory damages, noting that "treble damages are a common form of punitive damages," and that plaintiff in the case received only double damages. *Id.*

In *Busse*, 79 Ill. Dec. 747, 464 N.E.2d at 657-58, where, as discussed, the collateral was fraudulently impaired but no default had yet occurred on repayment of the loan, the Court, though recognizing that under Illinois law it could have awarded plaintiff the full amount of the loan plus interest, limited recovery to the reduction in the value of the collateral. *Id.*

Finally, in *Commercial Nat'l Bank of Peoria*, 87 Ill. Dec. 107, 476 N.E.2d at 815, a case where plaintiff was fraudulently induced to lend $90,000 to a small manufacturing corporation by false statements as to the financial viability of that corporation, the Illinois Appellate Court, citing *Horne*, opined that the proper measure of damages was "the sum of money lent plus interest for the time that

plaintiff was deprived of possession" (in that case, from the time of the loan until judgment). *Id.*

From the foregoing discussion, it is clear that Illinois fraud law has no limitation of standing comparable to the Second Circuit's RICO requirement that a plaintiff exhaust his contractual remedies and show a clear and definite measure of damages before bring suit. On the contrary, Illinois courts have allowed plaintiffs who were fraudulently induced into making loans to sue for fraud even before default occurred and to recover any of a wide variety of damages, up to and including the full amount of the loan plus interest, not to mention punitive damages. Finally, it is clear that Illinois law places on the defendant the burden of proving contractual defenses and mitigation of damages, rather than making pursuit of these aspects part of the plaintiff's burden of bringing suit.[8] Accordingly, defendants' motion to dismiss MCC's claims under Illinois law for common law fraud, promissory fraud, and civil conspiracy must be denied.

As to the sixth motion, MCC moves to amend its complaint to assert an Illinois claim for impairment of collateral. While Illinois law recognizes such a claim, *see Hummer* v. *R.C. Huffman Const. Co.*, 63 F.2d 372 (7th Cir. 1933), the measure of fraud damages available to the Court under Illinois law, as surveyed above, enables the Court, if it finds for MCC on the fraud claims (as it does, *see* Part II,

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[8] In the instant case, defendants, by failing to appear at trial, have failed to meet this burden in any respect and have therefore effectively waived any affirmative defenses or mitigative reductions they might otherwise be able to assert to plaintiffs' fraud claims or to the assessment of damages thereunder. In a similar fashion, while defendants raise in their motion to dismiss a number of additional objections to the state law claims beyond those considered above, these are without exception non-jurisdictional defenses that reasonably could have been raised at or before the trial and have therefore been waived. *See* Part I(1), *supra*.

infra), to fully compensate MCC for all the damages it suffered from defendants' entire scheme. Accordingly, there is no occasion to add the impairment claim, and MCC's motion to add a claim for impairment of collateral is therefore denied as moot.

As to the seventh motion, plaintiffs move to extend their constructive trust claim to cover certain of defendants' money and property located in New York.

By way of background, plaintiffs' constructive trust claim—Count XII of the Complaint—applies on its face only to the Telsim stock presently held by defendant Standart Telekom. The theory of the claim is that when, as part of the fraudulent scheme to dilute the collateral, Rumeli Telefon waived its preemptive rights, thereby allowing Standart Telekom to acquire 49% of the outstanding shares of Telsim, it was tantamount to a conversion of a large part of the collateral and accordingly the Telsim shares so acquired should be deemed to be constructively held for plaintiffs' benefit. *See Motorola*, 322 F.3d at 138 n.5. *See generally*, *Republic of Philippines* v. *Marcos*, 806 F.2d 344, 355 (2d Cir. 1986). In addition, however, after the Court learned that defendants, in violation of their sworn promise not to register the resolutions of January 4, 2003 transferring control rights from the shares held by Rumeli Telefon to those held by Standart Telekom, had gone ahead and done so—thereby completing the effective conversion of plaintiffs' collateral—it allowed plaintiffs to broaden their constructive trust claim to apply to the collateral or its functional equivalent (so as to obviate the fraudulent conversion and restore plaintiffs' true collateral to the *status quo ante*).

Although defendants now try to suggest, (albeit only in a footnote, *see* Defendants' Memorandum of Law in Support of their Motions of April 4, 2003, at 60 n.36) that this Court previously dismissed this claim, that is entirely inaccurate, as the underlying reference cited in defendants' footnote

plainly shows that, far from having decided the issue in defendants' favor, the Court had not at that time yet focused on the constructive trust question. *See* PT-458 (oral argument at preliminary injunction hearing) at 1211-12. Indeed, the Court of Appeals recognized as much, for it directed this Court, on remand, to determine whether, even though Nokia did not join in the Illinois fraud claims (presumably because Nokia had insufficient contacts with Illinois), "Nokia's allegation of a Constructive Trust/ Equitable Lien cause of action (it is unclear whether that claim is based on Illinois or New York law) might provide an alternative basis for upholding the preliminary injunction in aid of Nokia." *Motorola*, 322 F.3d at 137 n.4. Even now, moreover, defendants have not argued in their memorandum of law that the constructive trust claim as set forth in the Complaint should be dismissed; and any objections to it they now raise for the first time—such as the suggestion that it is governed by Turkish or Swiss law—have long since been waived.[9]

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[9] Even if this were not so, defendants have also waived their right to seek application of foreign law by failing to comply with Rule 44.1, Fed. R. Civ. P., or otherwise to provide sufficient information to warrant application of foreign law, *see* Restatement (Second) Of Conflict Of Laws § 136 cmt. h (1971) ("[W]here either no information, or else insufficient information, has been obtained about the foreign law, the forum will usually decide the case in accordance with its own local law except when to do so would not meet the needs of the case or would not be in the interests of justice."); *Torah Soft Ltd.* v. *Drosnin*, 224 F. Supp. 2d 704, 712 (S.D.N.Y. 2002) ("It is well-established that in the absence of proof of foreign law, the law of the forum governs."); *In re Bennett Funding Group, Inc. Secs. Litig.*, 270 B.R. 126 (S.D.N.Y. 2001) ("[E]ven if [the parties had not consented to the application of New York law], the Court finds that the law of the forum state—*i.e.*, New York—would still apply because none of the parties have proven foreign law through the submission of affidavits, statutory authority, case authority, sworn testimony or other similar evidence.").

As for the query put by the Court of Appeals regarding whether this claim is governed by Illinois or New York law, since there appears to be no substantive difference in the law of those two states applicable to this claim, the Court does not have to reach which law governs. Both New York and Illinois take a very broad view of constructive trust that would readily make it applicable to any form into which the original collateral was fraudulently diverted. As stated in the leading New York case of *Simonds* v. *Simonds*, 45 N.Y.2d 233, 408 N.Y.S.2d 359, 380 N.E.2d 189, 194 (1978), a "constructive trust will be erected whenever necessary to satisfy the demands of justice . . . . [I]ts applicability is limited only by the inventiveness of men who find new ways to enrich themselves unjustly by grasping what should not belong to them," and the court "reserves freedom to apply this remedy to whatever knavery human ingenuity can invent." (internal quotation marks omitted).

Plaintiffs, however, have now moved to amend the Complaint to extend the constructive trust beyond the collateral to certain money and property located in New York that the plaintiffs have attached in connection with this lawsuit. So far as MCC is concerned, however, such extension of the constructive trust is unnecessary, since, for reasons set forth in Part II, *infra*, MCC is entitled to a monetary judgment against which it can directly apply the attached money and property: hence, it has an adequate remedy at law. *See Sec. Investor Prot. Corp.* v. *Stratton Oakmont, Inc.*, 234 B.R. 293, 333 (Bankr. S.D.N.Y. 1999). As for Nokia, it has failed to satisfy the tracing requirement of a constructive trust claim so far as the New York property is concerned. *See Rogers* v. *Rogers*, 63 N.Y.2d 582, 483 N.Y.S.2d 976, 473 N.E.2d 226, 227 (1984).[10]

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[10] By contrast, Nokia has satisfied the tracing requirement on the collateral. *See* Part II, *infra*.

Accordingly, plaintiffs' motion to amend the complaint to extend the constructive trust claim to cover certain money and property located in New York is denied.

As to the eighth motion, defendants renew their previously-denied motion to dismiss the case on *forum non conveniens* grounds, noting that this Court's prior denial relied, *inter alia*, on the presence of the now-dismissed RICO claims, which, in the form here pleaded, have no equivalent in the proposed alternative forum of Switzerland. *See* Order, dated September 30, 2002; Memorandum Order, dated October 16, 2002, 2002 WL 31319932, at *3.

"To prevail on a motion to dismiss on the ground of *forum non conveniens*, a defendant must demonstrate (1) that there exists an adequate alternative forum, and (2) that the ordinarily strong presumption favoring the plaintiff's chosen forum is overcome by a balance of the relevant factors of private and public interest weighing heavily in favor of the alternative forum." *Aguinda* v. *Texaco, Inc.*, 142 F. Supp. 2d 534, 538 (S.D.N.Y. 2001) (internal citations omitted), *aff'd*, 303 F.3d 470 (2d Cir. 2002).

Here, defendants do not even meet the first requirement, for they have not consented to being sued in the courts of Switzerland (their only proposed alternative forum) and are not otherwise subject to personal jurisdiction in those courts. *See Jota* v. *Texaco, Inc.*, 157 F.3d 153, 159 (2d Cir. 1998). The fact that, through their counsel, they have consented to submit these matters to arbitration before a Swiss Arbitral Tribunal sponsored by the Zurich Chamber of Commerce is irrelevant, for the doctrine of *forum non conveniens* relates to transfer between the courts of different sovereigns and has no bearing on transfer to an arbitral entity, consent to whose jurisdiction is a matter of private contract, *see* Part I(9), *infra*; *see generally, AT & T Techs., Inc.* v.

Communications Workers of Am., 475 U.S. 643, 648 (1986). Moreover, an entity of such limited powers as the Swiss Arbitral Tribunal, which, for example, does not allow for either injunctive relief or discovery, *see* Transcript of Oral Argument Before the Court of Appeals, dated August 5, 2002, at 24, would not be an adequate forum in any case.

Moreover, even if defendants could somehow satisfy the first requirement for transfer under the doctrine of *forum non conveniens*, they could not satisfy the second requirement of showing that the balance of public and private factors[11] weighed sufficiently in their favor to overcome plaintiffs' choice of forum. Indeed, given that the trial on the merits has already concluded, the notion that it would be more "convenient" to retry the case in another forum is absurd. Defendants' decision not to participate in the trial should not alter this balance, since that decision was based not on any difficulty defendants faced in accessing the forum but on defendants' own tactical choice and their collusive procurement of Turkish injunctions purportedly barring their attendance.

Accordingly, defendants' motion to dismiss for *forum non-conveniens* is denied.

As to the ninth motion, defendants renew their previously-denied motion to compel arbitration of the remaining claims, arguing that the dismissal of the RICO

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[11] The private interest factors include the relative ease of access to sources of proof, the availability of compulsory process for attendance of unwilling witnesses, the cost of obtaining attendance of willing witnesses, as well as "all other practical problems that make trial of a case easy, expeditious, and inexpensive." *Borden, Inc.* v. *Meiji Milk Products Co.*, 919 F.2d 822, 827 (2d Cir. 1990) (*quoting Gulf Oil Corp.* v. *Gilbert*, 330 U.S. 501, 508 (1947)). The public interest factors include the administrative difficulties flowing from court congestion, the "local interest in having localized controversies decided at home," and the interest of having the trial of a case in a forum that is at home with the law that must govern the action. *Id.*

claims undercuts part of the rationale for the Court's prior denial.

It is true that the presence of the RICO allegations, supported not only by predicate acts of fraud but also by independently sufficient predicate acts of extortion, made this Court's earlier denial of arbitration a relatively easy decision. But this was not because of the presence of a RICO cause of action *per se*,[12] but because of the nature of the underlying allegations, most of which were entirely extrinsic to the transactions covered by the underlying contracts that included the arbitration clauses here in issue, and also because the defendants were not in any event parties to those contracts. *Cf. Genesco, Inc.* v. *T. Kakiuchi & Co., Ltd.*, 815 F.2d 840, 848 (2d Cir. 1987) (holding the RICO claims there asserted within the scope of the contractual arbitration because "[t]he wire, mail, and transportation fraud allegations which form[ed] the predicate acts of Genesco's RICO claim all derive[d] from the parties' transactions under the sales agreements [that contained the arbitration clause]"). How could it be said that the Uzans, with whom the plaintiffs had no contractual privity whatever (let alone an agreement to arbitrate disputes), could compel the plaintiffs to have a private commercial tribunal determine matters so extrinsic to Telsim's financing arrangements as whether the Uzans had falsely and for extortionate purposes, charged various Motorola, Inc., Motorola Turkey, and Nokia executives with threatening their murder and procured the arrest and prosecution of several of these executives? Such allegations—fully supported by the evidence (*see* Part II, *infra*)—are light-years removed from anything MCC or Nokia (or ABN-AMRO Bank, acting as Nokia's agent)

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[12] RICO claims are not inherently non-arbitrable. *See Shearson/American Exp., Inc.* v. *McMahon*, 482 U.S. 220, 239-243 (1987).

could reasonably, indeed, conceivably, have understood they were agreeing to arbitrate when they entered into their contracts to lend money to Telsim.

The point is that, while federal policy favors arbitration generally, and most especially in the context of international business transactions, *Mitsubishi Motors Corp.* v. *Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 629-31 (1985), the obligation to arbitrate nevertheless remains a creature of contract, *see AT & T Techs., Inc.* v. *Communications Workers of Am.*, 475 U.S. 643, 648 (1986) (internal quotation marks omitted).[13] "[A] party cannot be required to submit to arbitration any dispute which he has not agreed so to submit." *Id. Accord, e.g., First Options of Chicago, Inc.* v. *Kaplan*, 514 U.S. 938, 945 (1995); *Shaw Group Inc.* v. *Triplefine Intern. Corp.*, 322 F.3d 115, 120 (2d Cir. 2003).

With this bedrock principle in mind, the Court now addresses whether, in the absence of the RICO claims, arbitration of the remaining claims (*i.e.*, common law fraud, promissory fraud, civil conspiracy, and constructive trust) must be compelled. This, in turn, is a two-part inquiry: a court must decide "whether the parties agreed to arbitrate, and, if so, whether the scope of that agreement encompasses the asserted claims." *David L. Threlkeld & Co., Inc.* v. *Metallgesellschaft Ltd.*, 923 F.2d 245, 249 (2d Cir. 1991).

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[13] The current judicial preference for arbitration—stretched, perhaps, beyond any reasonable limits, *see* Thomas E. Carbonneau, *Arbitral Justice: The Demise of Due Process in American Law*, 70 Tul. L. Rev. 1945 (1966)—purports to be grounded in the Federal Arbitration Act, 9 U.S.C. § 1, *et seq.*, and in the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, June 10, 1958, [1970] 21 U.S.T. 2517, T.I.A.S. No. 6997, codified in 9 U.S.C. § 201 *et seq.* But neither of these statutes purports to overrule or extend the contractual agreements of private parties, but simply to effectuate what they have agreed to as determined by ordinary principles of contractual interpretation.

With respect to the first inquiry, it is undisputed that neither of the plaintiffs entered into any arbitration agreement with any of the defendants. Defendants, argue, however, that this is an artifice of pleading, an attempt to get around the arbitration agreements that MCC directly, and Nokia indirectly (through ABN-AMRO Bank) entered into with Telsim regarding the very loans that form the financial subject of this case. In such circumstances, defendants argue courts have "estopped [signatories] from avoiding arbitration with [] non-signator[ies] 'when the issues the nonsignatory is seeking to resolve in arbitration are intertwined with the agreement that the estopped party has signed.'" *Choctaw Generation Ltd. Parternship* v. *Am. Home Ass. Co.*, 271 F.3d 403, 404 (2d Cir. 2001), quoting *Smith/Enron Cogeneration Ltd. Partnership, Inc.* v. *Smith Cogeneration Int'l, Inc.*, 198 F.3d 88, 98 (2d Cir. 1999).

Such estoppel, however, is inapplicable here, for several reasons. First, the very allegations of the Complaint, let alone the overwhelming evidence now adduced in their support (*see* Part II, *infra*) show that this is not a case of trying to plead-around an agreement to arbitrate but rather of directly suing the real culprits, the Uzans, who simply used Telsim as a front to commit the instant fraud. It is Telsim that, if named, would have been the artificial defendant, for the Uzans are the real parties in interest.

Second, the estoppel doctrine invoked by defendants is rooted in equity, *see Merex A.G.* v. *Fairchild Weston Systems, Inc.*, 29 F.3d 821, 824 (2d Cir. 1994), and is therefore subject to the equitable maxim that "he who comes into equity must come with clean hands," *Precision Instrument Mfg. Co.* v. *Automotive Maintenance Machinery*, 324 U.S. 806, 814 (1945) (internal quotation marks omitted). From the very outset of this case, plaintiffs have demonstrated that defendants have acted fraudulently, a showing they made even before defendants sought to

compel arbitration.[14] Thereafter, defendants, through inconsistencies, omissions, false representations, and tactical diversions, effectively carried their fraud right into the courtroom. *See* Findings of Fact, *infra*.[15] A court faced with such conduct is constrained to deny the equitable relief of estoppel that defendants here seek to invoke in aid of arbitration. *See Precision Instrument Mfg Co.*, 324 U.S. at 814-15; *Keystone Driller Co.* v. *General Excavator Co.*, 290 U.S. 240, 245 (1933).

Finally, it may be noted that in entering into the agreements with Telsim that defendants here seek to invoke, MCC and ABN-AMRO Bank (on behalf of Nokia) expressly agreed that such agreements would be governed by the law of Switzerland, which strictly enforces privity of contract and generally prohibits non-parties from seeking to invoke contractual terms on their behalf. *See* Plaintiffs' Preliminary Injunction Exhibit ("PI")-14 (Declaration of Professor Dr. Franz Kellerhals dated April 2, 2002) ¶¶ 14-16; PI-19 (Declaration of Dr. Peter Straub dated March 19,

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[14] Indeed, it was some weeks into the litigation before defendants first suggested that arbitration should be compelled. *See* Memorandum of Law in Support of Defendants' Motion to Compel Arbitration, dated March 20, 2002. Thereafter, they did not unequivocally consent to arbitration until, on appeal before the Second Circuit, that Court required them to clarify their prior equivocations. *See* Transcript of Oral Argument Before the Court of Appeals, dated August 5, 2002, at 38-39.

[15] For example, after procuring, beginning on or about April 19, 2002, injunctions purporting to enjoin transfer of the collateral to this Court, defendants instructed their U.S. counsel, who learned of the injunctions in late April or early May, not to reveal their existence to this Court or to the Court of Appeals in seeking an emergency stay on May 22, 2002. Instead, not until May 28, 2002, well after the entry of the preliminary injunction order, did defendants bring these injunctions to the Court's attention. *See* Opinion, dated August 22, 2002, 2002 WL 1963301 at *5 & n.3; PT-459 (Hakan Uzan testimony at contempt hearing) at 30-32, 248.

2002) ¶ 7; PT-458 (Rolf Weber testimony at preliminary injunction hearing) at 359. While certain caselaw, although not exactly on point, suggests that this objection would not ordinarily prevent this Court from referring the matter in the first instance to the Swiss Arbitration Panel, *see Mitsubishi*, 473 U.S. at 639; *Rhone Mediterranee Compagnia Francese di Assicurazioni E Riassicurazoni* v. *Lauro*, 712 F.2d 50 (3d Cir. 1983); *Meadows Indemnity Co. Ltd.* v. *Baccala & Shoop Ins. Services*, 760 F. Supp. 1036 (E.D.N.Y. 1991); *Marchetto* v. *DeKalb Genetics Corp.*, 711 F. Supp. 936 (N.D. Ill. 1989), here the objection serves to reinforce the appropriateness in invoking equity to preclude defendants' motion, for it illustrates how, once again, they seek to misuse doctrines that were developed to effectuate legitimate arbitration to compel a commercial arbitration of their criminal scheme.

Accordingly, since the parties to this lawsuit did not agree to arbitrate any dispute between them, and since no basis exists in law or equity for allowing them to invoke Telsim's agreement to arbitrate, defendants' motion to compel arbitration must be denied.

It remains only to add that, even if this were not so, defendants would still not be able to compel arbitration with MCC, because the scope of the agreement between MCC and Telsim does not, as a matter of law, encompass MCC's remaining claims in this case. According to the Court of Appeals:

> To determine whether a particular dispute falls within the scope of an agreement's arbitration clause, a court should undertake a three-part inquiry. First, recognizing there is some range in the breadth of arbitration clauses, a court should classify the particular clause as either broad or narrow. Next, if reviewing a narrow clause, the court must determine whether the dispute is over an issue that is on its face within the purview of the clause, or over a collateral

> issue that is somehow connected to the main agreement that contains the arbitration clause. Where the arbitration clause is narrow, a collateral matter will generally be ruled beyond its purview. Where the arbitration clause is broad, there arises a presumption of arbitrability and arbitration of even a collateral matter will be ordered if the claim alleged implicates issues of contract construction or the parties' rights and obligations under it.

Louis Dreyfus Negoce v. *Blystad Shipping & Trading Inc.*, 252 F.3d 218, 224 (2d Cir. 2001) (internal quotation marks and citations omitted).

The agreements between MCC and Telsim most directly here relevant—the License Financing and Security Agreement, dated April 24, 1998 ("License Financing Agreement"), and the Equipment Financing and Security Agreement, dated April 24, 1998 ("Equipment Financing Agreement"), upon which the loans were extended—each provides in pertinent part:

> This Financing Agreement shall be governed by and interpreted in accordance with the internal laws (without regard to the laws of conflicts) of Switzerland. In the event a dispute *arises hereunder*, or under any document or agreement delivered in connection herewith, the parties will attempt to resolve such dispute through negotiation, mediation or another form of ADR in the first instance. Any dispute which cannot be resolved between the parties through negotiation, mediation or other form of ADR within four (4) months of the date of the initial demand for ADR by one of the parties, shall then be resolved, to the exclusion of the ordinary courts by a three-person Arbitral Tribunal in accordance with the International Arbitration Rules of the Zurich Cham-

> ber of Commerce ("the COC Rules") . . . . (emphasis supplied).[16]

Plaintiffs' Separately Marked Trial Exhibit DX ("DX")-3 (License Financing Agreement), at 23; DX-5 (Equipment Financing Agreement), at 23 (emphasis supplied). Similarly, the other relevant agreement—the Share Pledge Agreement, dated April 24, 1998—incorporates this language by reference. *See* DX-14 (Share Pledge Agreement) at 7 ("This Agreement shall be governed by and construed in accordance with the laws of Switzerland, and disputes shall be resolved in accordance with the procedures, terms and conditions set forth in the License Financing Agreement for resolution of disputes.").[17]

Thus, what the parties agreed to arbitrate was only a dispute that "arises hereunder, or under any document or agreement delivered in connection herewith." Under still binding Second Circuit precedent, this language renders the arbitration clause narrow in scope, *see In re Kinoshita*, 287 F.2d 951, 953 (1961), and inapplicable to MCC's state law claims of fraud and the like, which on their face concern

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[16] These agreements further provide that "The use of any ADR procedures will not be construed under the doctrine of laches, waiver or estoppel to affect adversely the rights of either party, and nothing in this section will prevent either party from resorting to judicial proceedings if: (1) good faith efforts to resolve the dispute under these procedures have been unsuccessful, or (2) interim relief from a court is necessary to prevent serious and irreparable injury to one party or to others." DX-3 (License Financing and Security Agreement dated April 24, 1998), at 3; DX-5, at 23. Thus, even if arbitration could be compelled, the injunctive relief ordered by this Court, *see* Part II, *infra*, would remain in aid of arbitration.

[17] While MCC or its affiliates also entered into several other agreements containing arbitration clauses, these agreements were, at best, collateral to the transactions here pertinent. *See* DX-18 (Pledgeholder Agreement) § 6.3; DX-19 (February 1, 2000 amendment to Pledgeholder Agreement) at 3-4; DX-1 (GSM Frame Contract) at 40.

matters extrinsic to the contract itself, such as fraudulent inducement, fraudulent diversion, and the like, rather than "disputes and controversies relating to the interpretation of the contract and matters of performance." *Id.*

The Court is aware that *Kinoshita* "has been frequently criticized in this Circuit" and has been "confined to its precise facts," that is to the phrase "arising under" or, at most, "its equivalent." *ACE Capital Re Overseas Ltd.* v. *Central United Life Ins. Co.*, 307 F.3d 24, 33 (2d Cir. 2002) (internal quotation marks omitted). But these are the words here used in the applicable agreements, and the fact remains that *Kinoshita* has not been overruled, *see, e.g.*, *Genesco* v. *T. Kakiuchi & Co.*, 815 F.2d 840, 854 n.6 (2d Cir. 1987) ("[W]e decline the invitation [to overrule Kinoshita]."); *S.A. Mineracao DA Trindade-Samitri* v. *Utah Int'l, Inc.*, 745 F.2d 190, 194 (2d Cir. 1984) ("We decline to overrule *In re Kinoshita*."). *Kinoshita* is therefore binding where, as here, the arbitration clause is indistinguishable from, if not more narrow than, the clause at issue in that case.

Moreover, it may be suggested that there is a good reason why *Kinoshita* has not been overruled. For all the current "tilt" in favor of arbitration, it is still a function of what the parties agreed to. Under ordinary principles of contract interpretation—indeed, under plain English meaning—"arising under" a contract cannot fairly be read to extend to disputes that either proceeded the formation of the contract (such as fraudulent inducement) or that are entirely extrinsic to the contract (such as the Uzans diverting of the loan monies into their own pockets). However much some courts may prefer arbitration, private parties are still entitled to have straightforward contractual agreements that are couched in simple English words enforced in accordance with their terms.

The difference between the language in MCC's contract with Telsim and the language in ABN-AMRO Bank's

contract with Telsim still further reinforces the conclusion that MCC never agreed to arbitrate the instant disputes. The ABN-AMRO Bank agreement, which in its most recent form is known as the "Third Facility Agreement" dated May 30, 2000 (*see* Findings of Fact, *infra*), provides that:

> Any dispute(s) *arising between the Parties out of or in connection with* this Agreement (including its interpretation, closing, execution, binding effect, amendment, breach, termination or enforcement) shall be submitted, to the exclusion of the ordinary courts, to a three-person arbitration tribunal in accordance with the International Arbitration Rules of the Zurich Chamber of Commerce . . . .

PT-1004D (Third Facility Agreement) §§ 22.1-22.2 (emphasis supplied).[18]

This is classic "broad" language, but by its very breadth it illustrates why the MCC-Telsim language is narrow and should not be interpreted to cover the same scope as the broad ABN-AMRO-Telsim language.[19]

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[18] Substantively identical language appears in the other agreements between ABN-AMRO Bank and Telsim, including the Second Facility Agreement dated March 10, 2000, *see* PT-1003B (Second Facility Agreement) §§ 22.1-22.2; the First Facility Agreement dated June 1999, *see* PT-1002A (First Facility Agreement) §§ 22.1-22.2, PT-1002E (First Facility Agreement) §§ 22.1-22.2; the Share Pledge Agreement dated March 10, 2000 (the "Phase II Share Pledge Agreement"), *see* PT-1003C (Phase II Share Pledge Agreement) §§ 6.2-6.3; the Share Pledge Agreement, dated October 1, 1999 (the "Phase I Share Pledge Agreement"), *see* PT-1002A (Phase I Share Pledge Agreement) § 12; and the NSS Frame Contract dated October 9, 1999 (the "Supply Contract"), *see* PT-1006A (Supply Contract) at 38.

[19] Presumably this is why, as noted by the Court of Appeals, ABN-AMRO Bank (but no one else on either side) commenced arbitration with Telsim prior to the start of this lawsuit. *See Motorola*, 322 F.3d at 134.

To be sure, Nokia itself is not a party to any of these agreements, but a reasonable argument can be advanced that ABN-AMRO Bank was acting as Nokia's agent in regard to these agreements. Thus, if the instant defendants were able to invoke these agreements on their own behalf, they could compel Nokia, but not MCC, to arbitrate. *See Thomson-CSF, S.A.* v. *Am. Arbitration Assoc.*, 64 F.3d 773, 777 (2d Cir. 1995) ("Traditional principles of agency law may bind a nonsignatory to an arbitration agreement."). But since, as previously noted, the instant defendants cannot invoke these agreements on their own behalf with respect to either of the plaintiffs, defendants motion to compel arbitration must be denied in its entirety.

As to the tenth motion, defendants move to dissolve the Court's preliminary injunction and attachment orders and void all related findings of contempt, on the grounds that (a) the case is subject to arbitration, (b) the remaining claims are insufficient to support a preliminary injunction, and (c) the Court's preliminary injunction was structurally flawed.

The first of these arguments fails because, as determined above, the case is not subject to arbitration. Moreover, even if this were not the case, the injunctive relief would be warranted as an injunction in aid of arbitration. Indeed, as noted earlier, MCC expressly bargained for such relief when it agreed with Telsim (in the arbitration clause defendants now seek to invoke for their benefit) that "nothing in this section will prevent either party from resorting to judicial proceedings if . . . interim relief from a court is necessary to prevent serious and irreparable injury to one party or to others."[20]

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[20] Also, there is no doubt about the power of this Court to issue injunctions and attachments in aid of arbitration pursuant to Rule 65, Fed. R. Civ. P. *See, e.g., Daye Nonferrouse Metals Co.* v.

As to the other objections, they are largely mooted by the fact that the Court of Appeals expressly declined to vacate the preliminary injunction but only directed this Court to address its scope, *see Motorola*, 322 F.3d at 138-39, and by the further fact that, as a result of the Court's determination of the merits (*see* Part II *infra*), the preliminary injunctions are now replaced by the permanent injunctive relief set forth below. Moreover, the same findings that supplement the Court's original grant of preliminary injunctive relief would have equally supported the same relief even if the only claims then before the Court were the state-law claims. *See* Supplemental Order of Attachment, dated January 3, 2003; Supplemental Order of Attachment, dated November 14, 2002; Order, dated August 29, 2002; Opinion, dated May 21, 2002; Order, dated May 10, 2002; Order, dated May 9, 2002.

It follows that defendants were rightfully held in contempt for failure to abide by the preliminary injunction, and that they remain in contempt to this day (*see* Part II, *infra*). While the Court of Appeals questioned the portion of the preliminary injunction extending beyond the collateral-derived Telsim stock held by defendant Standard Telekom to the collateral-related Telsim stock still held by non-party Rumeli Telefon, *see Motorola*, 322 F.3d at 138,[21]

Trafigura Beheer B.V., 96 Civ. 9740(RWS), 1997 WL 375680 at *5 (S.D.N.Y. July 7, 1997), 1997 U.S. Dist. LEXIS 9661 at *12, *vac. on other grounds*, 1998 WL 385968 (2d Cir. 1998), 1998 U.S.App. LEXIS 12943; *Alvenus Shipping Co., Ltd.* v. *Delta Petroleum* (U.S.A.) Ltd., 876 F. Supp. 482, 487 (S.D.N.Y. 1994). (To the extent defendants have preserved their objection under *Grupo Mexicano* v. *Alliance Bond Fund*, 527 U.S. 308 (1999)—which they have not raised in their post-*Motorola* submissions—the objection is answered in the Court's Opinion, dated May 21, 2002, 202 F. Supp. 2d at 250.)

[21] On a prospective basis in connection with the grant of permanent injunctive relief, *see* Part II, *infra*, the Court extends this

defendants willfully refused to transfer even the former stock to the registry of this Court, and that failure, along with their willful contempt of other provisions of the preliminary injunction not here challenged, was more than sufficient to require the finding of contempt.

As to the eleventh motion, defendants move to dissolve the Court's order enjoining defendants from pursuing certain Swiss arbitrations.

In granting plaintiffs' motion to enjoin defendants from pursuing some (but not all) foreign arbitrations, the Court noted that "it [was] painfully obvious that they were commenced in an effort to undercut the prior orders of, and proceedings before, this Court." Order, dated October 15, 2002, 2002 WL 31319932 at *4. As final judgment is now being entered on plaintiffs' state law claims and as plaintiffs' RICO claims will most likely not ripen until the arbitrations conclude, the arbitrations will no longer interfere with this Court's jurisdiction, and it is appropriate that they go forward at this time, so that plaintiffs can ultimately qualify to reinstate their RICO claims. Accordingly, the motion to dissolve the prohibition on defendants' pursuing certain Swiss arbitrations is granted.

This is not to suggest, however, that these defendants (as opposed to Telsim) have a lawful right to participate in such arbitrations; indeed, as previously indicated, this Court believes they do not. But in the present posture that itself becomes an issue for the arbitration panel, this Court holding only that defendants have no right to compel arbitration. Also, of course, any failure by defendants to adhere to this Court's prior order forbidding them from participating in the Swiss arbitrations may still be relevant

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aspect of the injunction to any Telsim stock presently held by any of the defendants or other Uzan-controlled entities that is the functional equivalent of the original collateral.

to the assessment of issues of willfulness and contempt still relevant to the instant case.

As to the twelfth motion, plaintiffs move to hold defendants in a further act of civil contempt for their failure to comply with the Court's Memorandum Order, dated January 6, 2003, which, *inter alia*, directed defendants, their proxies, and all others in concert with them "to take all steps necessary to withdraw and cause to be dissolved the Turkish injunction granted on November 27, 2002 and the action on which it is premised, and enjoin[ed] defendants from initiating any similar proceeding." Memorandum Order, dated January 6, 2003, 2003 WL 56998 at *2-3. Against the background of the defendants' prior acts of contempt, *see* Opinion and Order, dated August 22, 2002; Order, dated October 15, 2002; Memorandum Order, dated January 6, 2003, and for the further reasons set forth in the Findings of Fact, *infra*, the Court finds by clear and convincing evidence that the defendants have unreasonably failed to comply with the requirements of the January 6, 2003 Order. *See EEOC* v. *Local 580*, 925 F.2d 588, 594 (2d Cir. 1991). Further, as the aforementioned findings make plain, defendants' non-compliance was willful and was purposely designed to obstruct the proceedings before this Court. Accordingly, the Court hereby finds defendants in civil contempt for their non-compliance with the January 6 Order. The related issue of appropriate sanction to compel compliance is considered below in Part II.

As to the thirteenth motion, plaintiffs move for attorneys' fees and expenses as prevailing plaintiffs on their federal claims. As to the RICO claims, the motion is denied as moot and without prejudice to reinstatement should plaintiffs ultimately prevail on their RICO claims if and when they become ripe and are reinstated. As to the federal computer hacking claims, the motion is denied with prejudice, since these claims have now been dismissed with prejudice.

As to the fourteenth motion, non-party HSBC Mortgage Corporation (USA) ("HSBC") moves to modify the Court's prior orders of attachment to provide, in effect that, certain real properties presently attached can be sold pursuant to mortgage foreclosure, provided the proceeds are deposited with the United States Marshal for the Southern District of New York and become subject to the attachment, at which point the attachment orders shall not thereafter be liens on the real properties themselves. Having satisfied itself that no party to this litigation will be prejudiced by such modification, the Court hereby grants the motion.

Having disposed of the motions,[22] the Court next turns to the merits of the remaining state law claims and matters related thereto:

II. The Merits

Findings of Fact

The Court makes the following findings of fact based on the evidence of record, reasonable inferences drawn therefrom (including negative inferences drawn from false testimony), assessment of credibility and demeanor, and resolution of conflicts in the evidence. Exhibit and testimonial references cited below indicate some, though not necessarily all, of the direct evidence pertaining to a given finding but not necessarily the inferences drawn therefrom, which in some cases depend on assessment of the entire record.

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[22] In their Notice of Motion, dated April 4, 2003, defendants also purport to move on numerous other grounds, all of which are frivolous and, more importantly, in support of which, defendants offer no arguments in their Memorandum of Law accompanying the notice. Accordingly, all purported motions raised by defendants not otherwise addressed herein are hereby dismissed.

Plaintiffs and their Affiliates

1. Plaintiff Motorola Credit Corporation ("MCC"), an international supplier of telecommunications equipment, is a wholly owned subsidiary of Motorola, Inc. Both MCC and Motorola, Inc. have primary offices in Illinois. MCC provides financing for certain customers of Motorola, Inc. and affiliated companies. *See* Plaintiffs' Trial Exhibit ("PT") 458 (Edward Hughes testimony at preliminary injunction hearing) at 8, 12-13.

2. Motorola Ltd. is a company based in the United Kingdom that manufactured the cellular infrastructure equipment purchased by the Uzan-controlled company, Telsim Mobil Telekomunikayson Hizmetleri A.S. ("Telsim"), for the construction of its cellular telephone network.

3. Motorola Turkey is a company based in Turkey that provided some services with respect to Telsim's network and that sold certain handsets to Telsim.

4. Plaintiff Nokia Corporation ("Nokia"), headquartered in Finland, is a worldwide supplier of telecommunications equipment. Nokia provided Telsim with switching equipment and related services.

Defendants

5. Defendant Kemal Uzan is a citizen and domiciliary of the Republic of Turkey. Kemal Uzan is also an officer, director and/or owner of various companies controlled by the Uzans. *See* PT-232 (Rumeli Holding Annual Report); PT-442 (Thomas Brunner Deposition) at 27.

6. Defendant Murat Hakan Uzan ("Hakan Uzan") is a citizen and domiciliary of the Republic of Turkey and also is a citizen of the Kingdom of Jordan. Hakan Uzan is an officer, director and/or owner of various Uzan-controlled companies. Hakan Uzan is the son of defendant Kemal Uzan. *See* PT-436 (Responses to MCC Requests to Admit)

at Response No. 4; PT-232 (Rumeli Holding Annual Report); PT-233 (Telsim marketing materials); Answer ¶ 6.

7. Defendant Cem Cengiz Uzan ("Cem Uzan") is a citizen and domiciliary of the Republic of Turkey and also is a citizen of the Kingdom of Jordan. Cem Uzan is an officer, director and/or owner of various Uzan-controlled companies. Cem Uzan is the son of defendant Kemal Uzan and is the brother of defendant Hakan Uzan. *See* PT-436 (Responses to MCC Requests to Admit) at Response No. 11; PT-232 (Rumeli Holding Annual Report); Answer ¶ 7.

8. Defendant Melahat Uzan is a citizen and domiciliary of the Republic of Turkey. Melahat Uzan is the wife of defendant Kemal Uzan, and holds positions in various of the Uzan-controlled entities. *See* PT-436 (Responses to MCC Requests to Admit) at Response No. 26; PT-176 (Rumeli Cimento Charter Agreement, listing her as a "founder"); PT-178 (Registration and Approval of the Rumeli Cimento Charter Agreement); PT-179 (Rumeli Telekom Contract of Incorporation, listing her as a "foundation shareholder"); Answer ¶ 8.

9. Defendant Aysegul Akay ("Akay") is a resident of Istanbul, Turkey. Akay is a director and/or owner of various Uzan-controlled companies. Akay is the daughter of defendant Kemal Uzan and the sister of defendants Hakan Uzan and Cem Uzan. *See* Preliminary Injunction Exhibit ("PI") 26; (Rumeli Telefon board resolution); PI-29 (Standart Telekom articles of incorporation); PI-30 (Telsim board resolution); PT-177 (Rumeli Cimento corporate resolution); Answer ¶ 9.

10. Defendants Kamal Uzan, Hakan Uzan, Cem Uzan, Melahat Uzan, and Akay are collectively referred to here as the "Uzans" or the "Uzan family."

11. Defendant Antonio Luna Betancourt ("Luna") is a citizen of Mexico. Luna is a close associate of the Uzan

family and has served as a director of numerous Uzan-controlled companies. *See* PT-284 (Appendix 7 to Samuel Report) at 5-22, 24-26 (summary of bank transactions including instances in which Luna transacted business for various Uzan offshore companies); PT-1135 (letter dated May 20, 1998 from Luna to Nokia).

12. Defendant Standart Pazarlama A.S. ("Standart Paz") is a corporation organized under the laws of the Republic of Turkey with its principal place of business in Istanbul, Turkey. Defendants Cem Uzan and Hakan Uzan each own 39.4% of Standart Paz, and Akay owns another 20%, so that 98.8% of Standart Paz's stock is owned by the Uzans. *See* PT-218 (Standart Paz shareholder registry); *see also* PT-436 (Responses to MCC Requests to Admit) at Response Nos. 42, 43; Answer ¶ 11.

13. Defendant Standart Telekomunikasyon Bilgisayar Hizmetleri A.S. ("Standart Telekom") is a corporation organized under the laws of the Republic of Turkey with its principal place of business in Istanbul, Turkey. Defendants Cem Uzan and Hakan Uzan each own 39.4% of Standart Telekom, and Akay owns another 20%, so that 98.8% of Standart Telekom's stock is owned by the Uzans. *See* PI-29 (Standart Telekom articles of incorporation); PI-37 (Standart Telekom shareholder registry); PT-436 (Responses to MCC Requests to Admit) at Response Nos. 45-49; Answer ¶ 12.

14. Defendant Unikom Iletism Hizmetleri Pazarlama A.S. ("Unikom") is a corporation organized under the laws of the Republic of Turkey with its principal place of business in Istanbul, Turkey. Rumeli Telekom A.S. ("Rumeli Telekom"), another Turkish company controlled by the Uzan family, owns 90% of the stock of Unikom. *See* PT-436 (Responses to MCC Requests to Admit) at Response Nos. 53-55; Answer ¶ 13.

Procedural Background

15. Plaintiffs filed this action on January 28, 2002. On that same day, plaintiffs sought an *ex parte* temporary restraining order commanding defendants to, among other things, deposit 73.5% of Telsim's stock into the Court's registry and to refrain from further diverting any assets from Telsim. The Court granted the temporary restraining order and set a hearing for February 11, 2002 to determine whether the restrictions placed upon defendants should be continued.

16. At an in-court conference on February 1, 2002, defendants through their counsel Robert F. Serio Esq., of the law firm of Gibson, Dunn & Crutcher LLP (who at the time represented all defendants), requested a postponement of the February 11, 2002 hearing, so that it could be consolidated with a full preliminary injunction hearing, but, pending that hearing, consented to continuation of all of the restrictions placed upon defendants by the temporary restraining order other than the requirement that they deposit Telsim stock into the Court's registry and requested leave to file a motion to modify the temporary restraining order so that defendants would not be required to deposit Telsim's stock into the Court's registry. The Court set a briefing schedule for defendants' motion to modify the temporary restraining order, and scheduled the preliminary injunction hearing for April 9, 2002.

17. On February 7, 2002, defendants filed their motion to modify the temporary restraining order. In those papers, defendants consented to all portions of the temporary restraining order until a decision was rendered on plaintiffs' preliminary injunction motion, other than the requirement that defendants deposit Telsim's stock into the Court's registry.

18. On February 14, 2002, after receiving further briefing, the Court issued an opinion and order on defendants' motion to modify the temporary restraining order. Although the Court rejected defendants' argument that the Court lacked the power to order the deposit of Telsim's stock into the Court's registry, the Court granted defendants' motion as a matter of prudence, recognizing that a full evidentiary hearing on plaintiffs' preliminary injunction motion was scheduled to begin on April 9, 2002.

19. On March 15, 2002, defendants filed an opposition to plaintiffs' motion for a preliminary injunction. Included in that filing were sworn declarations from Kemal Uzan, Melahat Uzan, Hakan Uzan, Akay, Luna, and representatives of the three corporate defendants.

20. On March 20, 2002, defendants served two motions to dismiss plaintiffs' complaint and to compel arbitration. All of the defendants other than Cem Uzan asserted the defense of lack of personal jurisdiction. Counsel for defendants subsequently confirmed in open court (at the preliminary injunction hearing) that Cem Uzan was not contesting personal jurisdiction. *See* PT-458 (transcript of PI hearing) at 796-97. It was not until August 5, 2002, however, during the oral argument before the Court of Appeals, that all of the defendants unequivocally consented to arbitration. *See* Transcript of Oral Argument Before the Court of Appeals, dated August 5, 2002, at 38-39.

21. On March 25, 2002, defendants filed a motion seeking a "blocking order" that would render Hakan Uzan immune from service of process if he appeared at the preliminary injunction hearing. In an order dated April 1, 2002, the Court denied defendants' motion as insufficiently supported. (However, the Court subsequently granted a motion for a blocking order in connection with the contempt hearing, *infra*.)

22. On March 22, 2002, the Court entered a Case Management Plan and Scheduling Order after receiving comments from both sides. On April 3, 2002, the parties exchanged initial disclosures as required by the Case Management Plan and Scheduling Order.

23. The preliminary injunction hearing began as scheduled on April 9, 2002 and concluded on April 18, 2002. The Court heard testimony on April 9, 10, 12, 15, and 16, 2002, and heard oral argument from counsel on April 18, 2002.

24. The preliminary injunction hearing was a fully contested hearing. Plaintiffs, who had the burden of proof, called a total of seven witnesses, namely, Edward Hughes, Ernst Kramer, Dr. Fadlullah Cerrahoglu, Randy Rosetta, Ferda Yildiz, Allan Baxter, and Jeffrey Diamond, Esq. Defendants' attorneys cross-examined all of these witnesses other than Mr. Diamond, a New York lawyer who has represented the Uzans for several years and who was called by plaintiffs for the purpose of establishing facts relevant to the issue of personal jurisdiction.

25. Defendants called a total of five live witnesses, namely, Fatih Azami, Dr. Omer Teoman, Professor Necmi Yuzbasioglu, Michael Coyne, and Gervase MacGregor. Mr. Azami, the Chief Financial Officer of Telsim, was also permitted to remain at defendants' counsel table throughout the proceedings on defense counsel's representation that "he is likewise a representative of the Uzan family." PT-458 (Robert Serio statement at PI hearing) at 749. Additionally, each of the defendants other than Cem Uzan submitted a sworn statement that the Court received, including a seventy-six page declaration from Hakan Uzan. Defendants also submitted a declaration from Vincent Love, a witness who was available to testify but as to whom plaintiffs waived their right of cross-examination. However, although the Court had previously indicated its preference for live testimony over affidavits, none of the defendants

elected to appear in person to testify at the preliminary injunction hearing.

26. On May 9, 2002, after receiving further briefing, the Court issued a preliminary injunction, ordering defendants to, among other things, deposit 73.5% of Telsim's stock into the Court's registry by May 24, 2002 and prohibiting defendants from taking any action to affect the status of the Telsim stock pledged to plaintiffs. The Court followed that order with an opinion dated May 21, 2002 detailing its findings that plaintiffs had proved, by clear and convincing evidence, both a strong likelihood of success on the merits and a strong likelihood that they would be irreparably harmed if the injunction did not issue.

27. On May 10, 2002, the day after the Court issued the preliminary injunction, defendants, in direct violation of the injunction and the prior temporary restraining order, took steps in Turkey to further dilute the Telsim shares pledged to plaintiffs. This was not revealed to the Court until discovered by plaintiffs on May 21, 2002.

28. On May 14, 2002, the firm of Baker Botts LLP, by R. Stan Mortenson, Esq., filed a notice of appearance on behalf of the individual Uzan defendants.

29. Beginning on or about April 19, 2002, at the instance of third parties acting in collusion with defendants, three injunctions were issued by local Turkish courts prohibiting the transfer of Telsim stock outside Turkey. Defendants expressly directed their U.S. counsel not to reveal this to the Court, or subsequently, to the Court of Appeals to which defendants appealed on May 22, 2002 for an emergency stay of the preliminary injunction. Defendants' counsel did not reveal this information until May 28, 2002. *See* Opinion and Order, dated August 22, 2002, 2002 WL 1963301 at *5 & n.3.

30. As defendants had failed to comply with the preliminary injunction by failing to deposit 73.5% of

Telsim's stock into the Court's registry and by taking action to dilute the value of the stock pledged to plaintiffs, plaintiffs moved on May 28, 2002 for a finding of civil contempt against defendants. The Court scheduled a hearing on the contempt motion for June 10, 2002.

31. At the June 10, 2002 hearing, defense counsel informed the Court that Hakan Uzan would like to appear to present live testimony on the contempt motion, but that he was concerned that plaintiffs would serve him with process during his appearance in New York and that the Court might use Hakan Uzan's appearance to order him coercively confined pending compliance with the preliminary injunction motion. Plaintiffs, however, agreed not to serve any process on Hakan Uzan during his travel to New York for testimony on the contempt motion, and the Court gave Hakan Uzan "safe passage" by indicating that it would not issue a ruling on the contempt motion during the time that Hakan Uzan was in New York to testify. The Court scheduled a resumption of the contempt hearing for June 21 and 24, 2002 so that Hakan Uzan could appear to testify.

32. At the June 10, 2002 hearing, defense counsel once again reconfirmed that Cem Uzan had waived any defense of lack of personal jurisdiction. *See* Transcript dated June 10, 2002, at 20 (statement by defendants' counsel that "Mr. Cem Uzan, by not filing a motion has, for legal purposes, waived the defense [of lack of personal jurisdiction]").

33. Hakan Uzan appeared and gave live testimony on both June 21 and 24, 2002. The Court made clear that Hakan Uzan was free to testify about virtually any issue relevant to the case, since it would all bear on his intent with regard to the contempt. *See* PT-459 (transcript of contempt hearing) at 26.

34. On August 22, 2002, the Court issued an order finding Hakan Uzan's testimony incredible in material

respects and holding defendants in civil contempt based on their violations of the preliminary injunction order. *See* Opinion and Order dated August 22, 2002. Nevertheless, the Court imposed a modest coercive fine of $1000 (doubling, however, each month) in the express hope that it would bring defendants into compliance.

35. On September 23, 2002, defendants—representing that they were intent on fully litigating the merits of the case—moved for a three-month extension of the October 15, 2002 cut-off set in the Case Management Plan. On October 1, 2002, the Court granted their request in part, extending the discovery cut-off until November 22, 2002.

36. Meanwhile, defendants had also represented to Magistrate Judge Maas, to whom certain discovery aspects of the case had been referred, that they intended to fully litigate the case on the merits. *See Motorola Credit Corp.* v. *Uzan*, 02 Civ. 666(JSR) (FM), 2003 WL 203011, at *2 (S.D.N.Y. Jan. 29, 2003). In response, by order dated September 13, 2002 (and over plaintiffs' objections), Magistrate Judge Maas extended the limit on the number of depositions to twenty depositions per side, plus experts. *See* Transcript dated September 13, 2002, at 46-47.

37. On September 30, 2002, the Court issued an order denying defendants' motion to dismiss plaintiffs' complaint, and denying defendants' motion to compel arbitration. *See* Order, dated September 30, 2002; Memorandum Order, dated October 15, 2002.

38. On October 1, 2002, a hearing was held on plaintiffs' request to increase the contempt sanctions. At that hearing, defendants requested additional time to comply with the Court's May 9 preliminary injunction order, and represented that they would make diligent efforts to do so over the next six to eight weeks. Based on this representation, the Court issued a decision on October 15, 2002, keeping the contempt fines at the presently-set levels until

November 26, 2002 but increasing the fine at the end of November 2002 to $100 million, with the fine to double each month thereafter. *See* Order dated October 15, 2002.

39. On October 15, 2002, defendants filed their answer to plaintiffs' complaint. Defendants Hakan Uzan and Cem Uzan filed counterclaims and third-party claims, which they subsequently voluntarily dismissed on November 11, 2002.

40. By letter dated October 21, 2002, defendants moved to stay this lawsuit pending their appeal of the Court's September 30 and October 15 orders. The Court denied this motion by Memorandum Order dated October 28, 2002.

41. On November 27, 2002, defendants obtained an *ex parte* order from a Turkish court purporting to enjoin this Court from proceeding with this action. On January 6, 2003, this Court issued an order enjoining defendants from proceeding with the Turkish suit and requiring them to take all steps necessary to have the injunction dismissed or withdrawn. *See* Memorandum Order dated January 6, 2003, 2003 WL 56998 at *2-3.

42. Despite periodic claims that they were appearing in this suit for limited purposes and/or that they were barred by the Turkish courts from defending this action, defendants filed more than seventy-five separate legal papers in this action, both in this Court and in the Second Circuit. Defendants' counsel appeared more than twenty-nine times for hearings in this action.

43. Until November 2002, defendants also participated in discovery in this action. Defendants served document requests on plaintiffs, in response to which plaintiffs produced more than 96,000 pages of documents. Defendants also appeared on multiple occasions before Magistrate Judge Maas to seek orders compelling plaintiffs to produce documents, and other discovery. Ultimately, however, defendants refused to produce themselves for depositions or to produce most of the other discovery requested by

plaintiffs, raising various objections that Judge Maas determined were spurious. *See Motorola Credit Corp.* v. *Uzan*, 02 Civ. 666 (JSR) (FM), 2003 WL 203011, at *1-4 (S.D.N.Y. Jan. 29, 2003).

44. As a result, plaintiffs were able to obtain only five depositions, all of non-parties.

45. The Court had previously set a February, 2003 trial date. On January 24, 2003, defendants filed a statement reciting that they would not participate in person, or through counsel, in the trial of this action, purportedly on the basis of the Turkish injunction that they had obtained contumaciously in violation of this Court's order. *See* Defendants' Statement of Intention Regarding the Trial Scheduled for February 10, 2003, dated January 24, 2003.

46. On January 31, 2003, the Court granted plaintiffs' motion to withdraw their jury demand. In light of the fact that defendants had previously contested both the preliminary injunction hearing and the contempt hearing, the Court permitted plaintiffs' counsel to rely at trial on evidence from those prior hearings, as well as to present new evidence.

47. At the February 18, 2003 trial, plaintiffs principally relied on testimony adduced at the preliminary injunction hearing, a hearing in which defendants' counsel had participated and vigorously cross-examined plaintiffs' witnesses. In addition, plaintiffs presented additional testimony by declaration from Edward Hughes, Ernst Kramer, Anthony Samuel, and Ian Menzies. The four witnesses who submitted declarations all appeared in court on February 18, 2003 in order to take the stand and respond to any questions posed by the Court. Of particular importance was plaintiffs' expert, Mr. Samuel, whose report and testimony evidences the huge diversions of funds from Telsim by defendants. Plaintiffs also relied on documentary evidence, much of which was evidence admitted into the

record at the preliminary injunction hearing. Neither defendants nor their counsel appeared for trial.

Personal Jurisdiction

48. Notwithstanding defendants' refusal to be deposed, plaintiffs, as the Court has previously ruled, *see* Opinion dated May 21, 2002, 202 F. Supp. 2d at 251; Order dated September 30, 2002, have carried their burden of establishing personal jurisdiction over defendants. Indeed, given Cem Uzan's concession of personal jurisdiction and the Court's findings, *infra*, that he participated from New York in furthering a civil conspiracy that included the other defendants that alone would be sufficient to establish personal jurisdiction over all defendants. Also, regarding the Illinois state counts, it is undisputed that various of the Uzan defendants signed numerous documents relating to the transactions here in issue that were forwarded to MCC in Illinois. Additionally, however, the following facts support personal jurisdiction as to each defendant.

Kemal Uzan

49. Kemal Uzan owns real property in New York at 100 United Nations Plaza, #45A, New York, New York 10017. *See* PT-436 (Responses to MCC Requests to Admit) at Response No. 2; PT-453 (Declaration of Kemal Uzan dated March 14, 2002 ("K. Uzan Decl.")) ¶ 2; PT-448 (Kemal Uzan witness statement in English proceeding) ¶ 4.

50. Kemal Uzan admits to "maintain[ing] bank accounts at two New York financial institutions." PT-453 (K. Uzan Decl.) ¶ 6.

51. Kemal Uzan has had frequent and extensive contacts with the New York City branch of UBS AG ("UBS New York").

52. For example, Kemal Uzan has maintained a personal bank account with UBS New York since 1997. He has used

this account to pay condominium fees and utility expenses associated with his New York real property. *See* PT-142 (UBS letter attaching Kemal Uzan's bills dated August 14, 2002); PT-181 (account master agreement dated July 31, 1997).

53. Kemal Uzan also serves as a client contact for Telsim's account at UBS New York. According to the account master agreement and power of attorney, he is the only individual with full signatory authority on the account. *See* PT-185 (account master agreement dated March 9, 1998); PT-186 (power of attorney dated March 20, 1998).

54. Kemal Uzan is likewise a client contact for Rumeli Cimento's account at UBS New York. According to the account master agreement, he is the only individual with full signatory authority on the account. *See* PT-180 (account opening dated July 21, 1997); PT-182 (account master agreement dated July 31, 1997).

55. Kemal Uzan is listed as a client contact on UBS New York's account for Yapi ve Ticaret ("Yapi"). See PT-134 (client commercial profile dated March 22, 1999). This account has had a balance as high as $200 million. *See* PT-285 (bank statement) at UBS 1 00734.

56. Kemal Uzan is listed as a client contact for Rumeli Telekom's account with UBS New York. *See* PT-192 (client commercial profile dated September 25, 1998).

57. Kemal Uzan negotiated with UBS New York for a $300 million loan to Telsim, which was combined with funds from MCC to purchase a Global Standard for Mobile ("GSM") license from Turkey in 1998. The loan was guaranteed by the cash deposits of Rumeli Cimento, Yapi, and Kemal Uzan himself. In April 1999, the loan was renewed by UBS New York for a year. In 2000, Kemal Uzan arranged for the loan to be paid off when he knew that such payment was in violation of the Telsim's agreements with MCC. *See* PT-127 (UBS credit protocol

dated April 3, 1998); PT-131 (Telsim credit approval dated April 23, 1999); PT-435 (Samuel Report) at 85-92 (discussing improper repayment).

58. In association with both his personal bank account and the accounts of Rumeli Group companies with UBS New York, Kemal Uzan has had extensive contacts with UBS representatives (mainly in New York City) for the purpose of transacting business through New York. The following table summarizes some of those contacts that have been recorded in UBS Client Visit Reports/Call Reports:

Exhibit	Description
PT-147	Meeting in New York 10/7/97
PT-145	Meeting in New York 12/30/97
PT-148	Meeting in New York 4/2/98
PT-148	Meeting in New York 4/7/98
PT-148	Meeting in Istanbul 6/16/98
PT-148	Meeting in New York 7/17/98
PT-148	Meeting in New York 10/20/98
PT-148	Meeting in New York 10/11/96
PT-148	Telephone Conversation 5/1/97
PT-148	Telephone Conversation 7/10/97
PT-148	Telephone Conversation 3/2/98
PT-148	Telephone Conversation 4/15/98
PT-148	Meeting in Istanbul 11/20/97
PT-148	Meeting in New York 1/29/01
PT-123	Meeting 3/4/99
PT-124	Meeting 3/20/00

59. Kemal Uzan also maintains a personal bank account with the New York branch of JP Morgan Chase (formerly

Chase Manhattan Bank). *See* PT-436 (Responses to MCC Requests to Admit) at Response No. 227; PT-285 (bank statement) at Chase 0006.

60. Kemal Uzan's passport indicates that he has entered the United States on at least twenty occasions since 1997. On nineteen of those trips he traveled to New York City. *See* PT-225 (passports).

61. In addition, Kemal Uzan admits in his declaration to having visited New York "approximately three times each year since January 1, 1997" and to "hav[ing] spent a maximum of approximately ten days at the New York apartment during each visit since January 1, 1997." PT-453 (K. Uzan Decl.) ¶ 3. Thus, by his own admission, he has spent approximately thirty days a year in New York each year since 1997. He also admits in his declaration to having visited the United States, other than New York, five times since January 1, 1997. *See* PT-453 (K. Uzan Decl.) ¶ 7.

Hakan Uzan

62. Hakan Uzan owns real property in New York at 100 United Nations Plaza #40E, New York, New York 10017, and also at 100 United Nations Plaza #46B, New York, New York 10017. *See* PT-436 (Responses to MCC Requests to Admit) at Response Nos. 8 and 9. *See also* PT-459 (Hakan Uzan testimony at contempt hearing) at 96; PT-454 (Declaration of Hakan Uzan dated March 14, 2002, ("H. Uzan Decl. dated March 14, 2002")) ¶ 185.

63. Hakan Uzan possesses a New York driver's license, which he has had since 1988 and which lists his address as 100 United Nations Plaza, #45A, New York, New York, 10017. *See* PI-43 (N.Y. Driving Record Abstract); PT-436 (Responses to MCC Requests to Admit) at Response No. 196; *see also* PT-459 (Hakan Uzan testimony at contempt hearing) at 108.

64. Hakan Uzan also owns vehicles registered in the United States. *See* PT-20 (vehicle registrations and related documents).

65. In April 1999, Hakan Uzan purchased apartments #89A and # 89B at 845 United Nations Plaza, New York, New York, 10017 for a combined price of over $14 million. These apartments made up the second highest floor (Cem Uzan purchased the top floor for $17 million) in the new Trump World Tower. Between April 1999 and October 2001, Hakan Uzan paid over $3 million dollars toward the purchase of the apartments. *See* PT-384 (Cem Uzan's purchase agreement for #89A); PT-385 (purchase agreements of April 26, 1999); PT-435 (Samuel Report) at 95-97 (describing payments).

66. In October 2001, Hakan Uzan refused to close on the Trump World Tower apartments. He and Cem Uzan then availed themselves of New York courts by bringing an action attempting to rescind their purchase agreements and to recover their down payments. In their complaint in that action, Hakan Uzan asserted that he maintained residences in the County, City, and State of New York. *See* PI-102 (Complaint, *Cem and Hakan Uzan* v. *845 UN Plaza Partnership*); *see also* PT-459 (Hakan Uzan testimony at contempt hearing) at 96-97.

67. Hakan Uzan has been represented for several years by the New York law firm of Marcus, Rosenberg, and Diamond ("MRD") in New York real estate transactions and other personal matters. The following is a summary of matters on which MRD performed work for Hakan Uzan, as demonstrated by MRD billing records:

Exhibit	Client Matter
PI-126	Cem and Hakan Uzan v. 845 UN Plaza Partnership
PI-129	Purchase of Apartments #40E and #46B at 100 UN Plaza

PI-130	Hakan Uzan Airplane Purchase
PI-131	Trump World Tower Apartment Purchase
PI-134	Star TV, USA Office Lease at 450 Park Ave.
PI-137	Cem and Hakan Uzan Contract Rescission
PI-139	Star TV, USA General Representation

68. Hakan Uzan appointed Luna his attorney in fact for the purchases of apartments #40E and #46B at 100 United Nations Plaza. *See* PI-45 (powers of attorney).

69. Flight logs indicate that Hakan Uzan has traveled to the United States on at least twenty-seven occasions between 1997 and 2002. *See* PT-175 (flight logs). In addition, Hakan Uzan admits that he has visited New York "approximately three times each year since January 1, 1997" and has "spent a maximum of approximately six total days at the New York apartments during each visit since January 1, 1997." PT-454 (H. Uzan Decl. dated March 14, 2002) ¶ 186. Thus, by his own admission, Hakan Uzan has been in New York City approximately eighteen days a year since 1997. Hakan Uzan's Turkish passport indicates that he has entered the United States on nine occasions between 1999 and 2001. *See* PT-173 (passport log).

70. Hakan Uzan maintains a personal bank account with UBS New York. He has used this account to pay condominium fees and utility expenses associated with his New York property. *See* PT-143 (UBS letter to Hakan Uzan dated August 14, 2002 attaching bills); PT-164 (UBS transaction detail for Hakan Uzan dated January 1, 2001 to February 7, 2001).

71. Hakan Uzan has joint signature authority along with Cem Uzan and Akay over Kemal Uzan's UBS New York

account. *See* PT-181 (account master agreement dated July 31, 1997); PT-183 (power of attorney).

72. Hakan Uzan also maintains personal bank accounts with the New York branches of JP Morgan Chase (formerly Chase Manhattan Bank) and HSBC USA. *See* PT-436 (Responses to MCC Requests to Admit) at Response Nos. 225, 227; PT-285 at Chase 0576, HBUS 00332.

73. Hakan Uzan maintains joint signatory authority with Cem Uzan and Akay over Rumeli Cimento's account with UBS New York. *See* PT-177 (Rumeli Cimento corporate resolutions); PT-180 (account opening dated July 21, 1997); PT-182 (account master agreement dated July 31, 1997).

74. Hakan Uzan maintains joint signatory authority with Cem Uzan and Akay over Telsim's account with UBS New York. *See* PT-185 (account master agreement dated March 9, 1998); PT-186 (power of attorney of March 20, 1998).

75. Hakan Uzan maintains joint signatory authority with Cem Uzan and Akay over Rumeli Telekom's account with UBS New York. *See* PT-191 (account master agreement dated August 26, 1998); PT-192 (commercial client profile dated September 25, 1998).

76. Hakan Uzan also transacts business extensively in New York and in other parts of the United States in his assorted roles with Rumeli Group companies. In 2001, Hakan Uzan filed and obtained a Non-Immigrant Visa for his role as Chairman of Rumeli Telecom, USA, which incorporated in New York in November 2000. *See* PI-44 (certificate of incorporation); C-49 (non-immigrant visa petition); *see also* PT-454 (H. Uzan Decl. dated March 14, 2002) ¶ 187; PT-459 (Hakan Uzan testimony at contempt hearing) at 105-108. In connection with this business endeavor, Rumeli Telecom leased office space on Park Avenue. *See* PT-459 (Hakan Uzan testimony at contempt

hearing) at 104; *see also* PT-458 (Jeffrey Diamond testimony at PI hearing) at 228-229.

77. On numerous occasions, while working in the United States, Hakan Uzan contacted representatives of MCC in furtherance of the activities that are at issue in this case. For example, in an email to Edward Hughes dated December 27, 1999, relating to the loans here in issue, Hakan Uzan represented that he was "working" in New York and could be reached at his "home number" or his "New York mobile" number. *See* PI-83 (email dated December 27, 1999 from Hakan Uzan to Edward Hughes); *see also* PT-459 (Hakan Uzan testimony at contempt hearing) at 103.

78. Hakan Uzan met with MCC in New York on April 11, 2001 and, in order to forestall the possibility that MCC would foreclose on the collateral, falsely represented to MCC that Telsim would take no action that would adversely affect MCC's ability to recover on its loans to Telsim. The Court finds that Hakan Uzan knew this representation was false when made, as shown by the overall fraudulent scheme described *infra* and also by the fact that less than two weeks later the Uzans, through Telsim and other entities they controlled, diluted the value of the collateral by two-thirds. *See* PT-458 (Edward Hughes testimony at PI hearing) at 80-81; *see also* PT-459 (Hakan Uzan testimony at contempt hearing) at 102-103.

Cem Uzan

79. As previously found, Cem Uzan does not contest personal jurisdiction over him. For example, as stated by his then attorney, Robert Serio, Esq., at the preliminary injunction hearing:

Mr. Serio: Your Honor, if I might, Cem Uzan has not raised a personal jurisdiction

defense, and so I wonder if these questions are relevant.

Mr. Brown: I guess the issue is whether Cem Uzan consents to jurisdiction.

The Court: I thought he had.

Mr. Serio: Your Honor, we had not raised any personal jurisdiction defense in this case.

The Court: With respect to him?

Mr. Serio: With respect to Cem.

The Court: So I take that to be de facto consent.

Mr. Serio: We certainly assume it would be so taken.

PT-458 (transcript of PI hearing) at 796-97.

80. Cem Uzan owns the following real property in New York: 515 Park Ave. #19, New York, New York 10022; 515 Park Ave. #3K, New York, New York 10022; 515 Park Ave. Storage Unit 3K, New York, New York 10022; 100 United Nations Plaza #29C, New York, New York 10017; 845 United Nations Plaza # 80B, New York, New York 10017. *See* PT-436 (Responses to MCC Requests to Admit) at Response Nos. 17, 18, 19, 20, 21; *see also* PT-447 (Cem Uzan Declaration in English proceeding) ¶ 4.

81. Cem Uzan's wife and children currently reside in the United States, as they did in 2001. *See* PT-436 (Responses to MCC Requests to Admit) at Response Nos. 22, 23; *see also* PT-459 (Hakan Uzan testimony at contempt hearing) at 92-93.

82. Cem Uzan's children currently attend school in New York, as they did in 2001. *See* PT-436 (Responses to MCC Requests to Admit) at Response Nos. 24, 25; *see also* PT-459 (Hakan Uzan testimony at contempt hearing) at 92-93.

83. Cem Uzan has possessed a New York Driver's License from 1998 to the present. *See* PT-436 (Responses to MCC Requests to Admit) at Response Nos. 197, 198.

84. In April 1999, Cem Uzan purchased apartments #90A and #90B at 845 United Nations Plaza, New York, New York, 10017, for a combined price of over $17 million. These apartments made up the top floor in the new Trump World Tower (Hakan Uzan purchased the second highest floor for $14 million). Between April 1999 and October 2001, Cem Uzan paid over $3 million toward the purchase of the apartments. *See* PT-380 (purchase agreement for #90B); PT-386 (purchase agreement for #90A); PT-435 (Samuel Report) at 95-97 (describing payments).

85. In October 2001, Cem Uzan refused to close on the Trump World Tower apartments. He and Hakan Uzan then availed themselves of New York courts by bringing an action attempting to rescind the purchase agreements and to recover their down payments. In their complaint in that action, Cem Uzan asserted that he maintained residences in the County, City, and State of New York. *See* PI-102 (Complaint, *Cem and Hakan Uzan* v. *845 UN Plaza Partnership*).

86. Cem Uzan has been represented by the New York law firm MRD in New York real estate transactions and other personal matters. The following is a summary of matters on which MRD performed work for Cem Uzan, as demonstrated by MRD billing records:

Exhibit	Client Matter
PI-126	Cem and Hakan Uzan v. 845 UN Plaza Partnership
PI-128	Cem Uzan Purchase of Connecticut House
PI-131	Trump World Tower Apartment Purchase

PI-133	Cem Uzan Purchases at 515 Park Ave.
PI-137	Cem and Hakan Uzan Contract Rescission
PI-139	Star TV, USA General Representation

87. Cem Uzan has recorded powers of attorney with New York County in connection with his real estate purchases. For example, he appointed Diamond and Marcus his attorneys in fact for the purchases of apartments at 515 Park Avenue. *See* PI-46 (power of attorney).

88. Flight logs indicate that Cem Uzan has traveled to the United States on at least twenty-six occasions between 1997 and 2002. *See* PT-175 (flight logs). Cem Uzan's passport shows that he has entered the United States on at least eleven occasions between 2000 and 2002. *See* PT-173 (passport log).

89. Cem Uzan has maintained a personal bank account with UBS New York. *See* PT-170 (Cem Uzan account statement for period dated April 1, 1996 to April 30, 1996).

90. Cem Uzan has joint signature authority along with Hakan Uzan and Akay over Kemal Uzan's UBS New York account. *See* PT-181 (account master agreement dated July 31, 1997); PT-183 (power of attorney).

91. Cem Uzan also maintains personal bank accounts for himself and his wife with the New York branch of HSBC USA. *See* PT-436 (Responses to MCC Requests to Admit) at Response No. 225; PT-285 (bank statement) at HBUS 378-505.

92. Cem Uzan maintains joint signatory authority with Hakan Uzan and Akay over Rumeli Cimento's account with UBS New York. *See* PT-177 (account signatories dated December 15, 1992); PT-180 (account opening dated

July 21, 1997); PT-182 (account master agreement dated July 31, 1997).

93. Cem Uzan maintains joint signatory authority with Hakan Uzan and Akay over Telsim's account with UBS New York. *See* PT-185 (account master agreement dated March 9, 1998); PT-186 (power of attorney dated March 20, 1998).

94. Cem Uzan maintains joint signatory authority with Hakan Uzan and Akay over Rumeli Telekom's account with UBS New York. *See* PT-191 (account master agreement dated August 26, 1998); PT-192 (commercial client profile dated September 25, 1998).

95. Cem Uzan also transacts business extensively in New York and in other parts of the United States in his assorted roles with Rumeli Group companies. For example, Cem Uzan oversees the business of Star Newspaper, USA and Star Television USA, both of which are incorporated in New York. *See* PI-44 (incorporation documents). Cem Uzan directed the law firm of MRD to form these companies. *See* PT-458 (Jeffrey Diamond testimony at PI hearing) at 214. He employed a personal assistant in New York, Nil Erbil, who worked at Cem Uzan's direction on these matters and others. *See id.* at 214-15. These entities also negotiated a lease for office space on Park Avenue. *See id.* at 228-229.

Melahat Uzan

96. Melahat Uzan owns real property in New York at 100 United Nations Plaza #23B, New York, New York, and 100 United Nations Plaza #26A, New York, New York. She has owned #23B since July 1996. *See* PT-436 (Responses to MCC Requests to Admit) at Response Nos. 27, 28; PT-220 (power of attorney for #23B); PT-221 (contract for sale of #23B); PT-223 (checks for Melahat Uzan purchase of

#23B); *see also* PT-451 (Declaration of Melahat Uzan dated March 14, 2002 ("M. Uzan Decl.")) at ¶ 2.

97. Melahat Uzan has collected rent on one or more of her properties in New York. For example, she rented #23B to Luna following water damage in his apartment in 1999. *See infra.* She admits to having purchased the apartment as an investment. *See* PT-451 (M. Uzan Decl.) ¶ 2.

98. Melahat Uzan has held a New York driver's license at some time between April 24, 1998 and now. The license listed her address as 100 United Nations Plaza #45A, New York, New York. *See* PT-436 (Responses to MCC Requests to Admit) at Response No. 200; PI-43 (license information).

99. Melahat Uzan was represented by the New York law firm MRD in her purchase of 100 United Nations Plaza #23B. *See* PI-138 (MRD billing records for #23B); PT-224 (letter from Jeffrey Diamond attaching deed to #23B).

100. Melahat Uzan's passport indicates she has entered the United States at least ten times since 1997, nearly always in New York. *See* PT-173 (passport log); PT-219 (Melahat Uzan passports). In addition, she admits to having visited New York approximately four times each year since January 1, 1997 and having spent a maximum of approximately ten days in New York during each such visit. *See* PT-451 (M. Uzan Decl.) ¶ 3. Thus, by her admission, she has spent approximately forty days in New York each year since 1997. In addition, she states that she has visited the United States (other than New York) five times since January 1, 1997. *Id.* ¶ 9.

101. Melahat Uzan maintains a personal bank account at JP Morgan Chase (formerly Chase Manhattan Bank) in trust for Akay. *See* PT-285 (bank statement) at Chase 0107. *See also* PT-451 (M. Uzan Decl.) ¶ 8.

102. Melahat Uzan is listed as a founder of Rumeli Cimento on that corporation's 1992 charter and the registration form for the charter. Rumeli Cimento

transacts business in New York through its UBS account. *See* PT-176 (Rumeli Cimento charter agreement); PT-178 (Rumeli Cimento registration of charter); PT-180 (Rumeli Cimento UBS account opening).

Aysegul Akay

103. Aysegul Akay's passport indicates that she has entered the United States on at least four occasions since 1997, always in New York. *See* PT-173 (passport log). She admits to having visited New York "approximately two times each year since 1997" and to having spent a "maximum of approximately ten days in New York" during each such visit. PT-452 (Declaration of Aysegul Akay dated March 14, 2002) ¶ 3. In addition, she states that she has visited the United States (other than New York) four times since January 1, 1997. *See id.* ¶ 8.

104. A sales agent for 845 United Nations Plaza swore under oath that Akay purchased one of the Trump World Tower apartments. *See* C-112 (Summary Judgment Motion and Affidavit of Sherry Tobak dated December 27, 2001).

105. Akay transacts business for the Rumeli Group companies through their New York bank accounts. On nearly all such accounts, she has signatory authority.

106. Akay maintains joint signatory authority with Hakan Uzan and Cem Uzan over Rumeli Cimento's account with UBS New York. *See* PT-177 (account signatories dated December 15, 1992); PT-180 (account opening dated July 21, 1997); PT-182 (account master agreement dated July 31, 1997).

107. Akay maintains joint signatory authority with Hakan Uzan and Cem Uzan on Telsim's account with UBS New York. *See* PT-185 (account master agreement dated March 9, 1998); PT-186 (power of attorney dated March 20, 1998).

108. Akay maintains joint signatory authority with Hakan Uzan and Cem Uzan on Rumeli Telekom's account with UBS New York. *See* PT-191 (account master agreement dated August 26, 1998); PT-192 (commercial client profile dated September 25, 1998).

109. Akay maintains joint signatory authority with Hakan Uzan and Cem Uzan on Kemal Uzan's personal account with UBS New York. *See* PT-181 (Kemal Uzan account master agreement dated July 31, 1997).

Antonio Luna Betancourt

110. Luna owns the following real property in New York: 100 United Nations #40E, New York, New York 10017; 845 United Nations Plaza #59C, New York, New York 10017; 845 United Nations Plaza #59D, New York, New York 10017. *See* PT-436 (Responses to MCC Requests to Admit) at Response No. 39; PT-381 (Luna purchase agreement for #59C); PT-382 (Luna purchase agreement for #59D); C-50 (deed for #59C); PT-450 (Declaration of Luna dated March 14, 2002 ("Luna Decl.")) ¶ 2. He has stated that he bought these apartments primarily as an investment. *See* PT-450 (Luna Decl.) ¶ 2.

111. The purchase price of $2.36 million was funded by the Rumeli Group with monies Luna purportedly received from his "employment within the Rumeli Group." *Id.*; *see also* PT-458 (Jeffrey Diamond testimony at PI hearing) at 207-08, 211-12. The money was wired by the Rumeli Group to MRD's Citibank account in New York. *See* PT-458 (Jeffrey Diamond testimony at PI hearing) at 207-08, 211-12.

112. In 1999, Luna was residing with his family at 100 United Nations Plaza in Apartment #40E (which he owns) when that apartment suffered water damage due to a leak from the floor above. While the apartment was repaired, Luna paid rent to Melahat Uzan and moved his family to

her apartment (#23B) in the same building. *See* PT-436 (Responses to MCC Requests to Admit) at Response Nos. 40, 41; C-109 (lease from Melahat Uzan to Luna).

113. Luna was represented by MRD in the dispute over payment for the water damage in his apartment in 1999. According to an MRD letter regarding this dispute, "Mr. Luna and his family were forced to move out of the apartment for six months, and considerable time and money [was] spent to repair the apartment and replace their belongings." In addition, MRD represented Luna in his purchase of Apartments #59C and #59D in the Trump World Tower at 845 United Nations Plaza. *See* PI-132 (billing records for water damage); C-110 (letter dated January 10, 2000 from MRD to Hon. Mohammed Samhan); PI-135 (billing records for purchase of #59C and #59D).

114. Luna holds a New York Driver's license. *See* C-43 (Luna's driver's license).

115. Hakan Uzan appointed Luna as his attorney in fact to coordinate and complete the purchases of Apartments #40E and #46B at 100 United Nations Plaza. *See* PI-45 (powers of attorney).

116. Luna maintains bank accounts with the New York branches of UBS, JP Morgan Chase (formerly Chase Manhattan Bank), and HSBC USA. *See* PT-450 (Luna Decl.) ¶ 6; PT-156, 157 (Luna UBS client visit reports); PT-285 (Luna bank statement) at Chase 0693; PT-285 (HSBC transaction report) at HBUS 01054. He has used funds from the Chase account to pay for condominium fees and other expenses related to his property in New York. *See* PT-436 (Responses to MCC Requests to Admit) at Response Nos. 225, 227-28; PT-153 (UBS client visit report dated August 14, 2001); PT-19 (Luna check from Chase account); PT-285 (bank statement) at HBUS 01054.

117. Luna has frequently been in contact with representatives of UBS New York to carry out transactions for

himself and the Uzans. The following table describes these contacts as reported in UBS Client Visit Reports/Call Reports:

Exhibit	Description
PI-153	Meeting in New York 8/14/01
PI-154	Cash Withdrawal 8/14/01
PI-155	Cash Withdrawal 4/20/01
PI-156	Meeting in New York 4/12/01
PI-157	Meeting in New York 2/9/01
PI-158	Meeting in New York 11/28/00
PI-159	Meeting 3/4/99
PI-160	Telephone Conference 8/16/00

118. Luna facilitated the purchase of an aircraft for the Uzans from Bombardier through accounts at UBS, receiving a "substantial payment" as a commission. *See* PT-156 (client visit report dated April 12, 2001); PT-153 (client visit report dated August 14, 2001).

119. Luna has been issued passports by a number of countries, including Italy, Monaco, and Mexico. *See* PT-436 (Responses to MCC Requests to Admit) at Response Nos. 202-05.

120. Luna has stated that he has visited New York "approximately six times each year since January 1, 1997" and has spent "a maximum of approximately eight days in New York during each visit since January 1, 1997." PT-450 (Luna Decl.) ¶ 3. Thus, by his own admission, he has spent approximately forty-eight days in New York each year since 1997. In addition, he states: "[o]ther than New York, [he has] visited the United States twenty times since January 1, 1997." *Id.* at ¶ 7.

121. Luna has stated that he holds positions as "an officer" of the New York companies of Star TV and Rumeli USA and that he has conducted meetings for these corporations in New York in his official capacity. *Id.* at ¶ 4.

122. Luna participated in negotiations between Telsim and MCC in December 1999 in Chicago that led to the Seventh Amendment, one of the financing agreements involved in this case. *See* PT-458 (Edward Hughes testimony at PI hearing) at 35.

123. Personal jurisdiction over the corporate defendants exists because they were, as detailed below, totally controlled by the Uzan defendants with respect to the transactions here in issue. In addition, further findings regarding jurisdiction over these entities is set forth *infra*.

Joint Control and Foundation for Civil Conspiracy

124. The Uzan defendants, directly or indirectly, own or control more than 130 active companies, including two holding companies—Rumeli Holding A.S. ("Rumeli Holding") and Prime Holding A.S.—as well as companies in the banking, cement, electricity, television, radio, newspaper, printing, insurance, construction, trade, jewelry, telecommunications, Internet, and sports industries. *See* PT-232 (Rumeli Holding Annual Report) at 12; PT-458 (Edward Hughes testimony at PI hearing) at 58-59; Answer ¶ 23; PT-325 (list of contact information for Uzan-controlled companies provided to UBS, with 62 different companies listed).

125. Specifically, the Uzan family directly or indirectly owns a majority interest in and controls the following companies:

Adabank AS (PT-232 at 9)

Adanaspor Spor Faaliyetleri AS (PT-232 at 9)

Alloy Aircraft Co., Ltd. (PT-403; PT-449)

Alpha International Co. Ltd. (PT-435, Appendix 4 at 8)

Altintas Altin ve Muceveherat (PT-437 at 16)

Ant Gazetecilik (PT-232 at 8)

Aysan Anadolu Yay Sanayi AS (PT-232 at 9)

Banko Musik AS (PT-232 at 9)

Bartin Cimento Sanayii Turk (PT-437 at 113)

Basintas Anadolu Basin Endustrisi (PT-437 at 63)

Beta Insaat ve Ticaret (PT-437 at 73)

Beyaz Basin Sanayi ve Ticaret AS (PT-437 at 84)

Bilgi Bilgisayar Ticaret AS (PT-437 at 62)

Birlesik Insaat Ticaret AS (PT-437 at 49)

Bis Organizasyon ve Menajerlik Ticaret AS (PT-437 at 253)

Brampton N.V. (PT-435 at app. 4, 7; PT-307; PT-341; PT-344; PT-348)

Brampton Holdings and Investment N.V. (PT-435, Appendix 4, at 1; PT-303; PT-340; PT-341; PT-344; PT-442 at 105, 107, 110 (Thomas Brunner Deposition))

BVS Bira Viski Su Sanayi (PT-437 at 174)

Cementownia Nowa Huta (Poland) (PT-232 at 9)

Clear Cut Ltd. (PT-435, Appendix 4, at 15)

Corfez Cimento ve Hazir Beton Sanayi ve Ticaret (PT-437 at 256)

Cukurova Elektrik AS (PT-437 at 271)

Demas Demir Mamulleri AS (PT-232 at 9)

Dogan Kardes Matbaacilik (PT-437 at 154)

Edirne Lalapasa Cimento (PT-232 at 9)

EMS Management Systems AG (PT-156; PT-311; PT-400; PT-405)

ERI Ltd. (PT-435, Appendix 4, at 16)

Ergani Cimento (PT-232 at 9)

Filpark Internet Hzm (PT-437 at 238)

Gaziantep Cimento Sanayii Turk (PT-437 at 138)

Grup Medya Reklamcilik ve Filmcilik (PT-437 at 95)

Gumushane Cimento Sanayii (PT-437 at 83)

Hawk Aviation Ltd. (PT-366; PT-367; PT-435, Appendix 4, at 16; PT-468)

Hurriyet International GMBH (PT-232 at 8)

Imar Bank (PT-437 at 314)

Imar Bank Offshore Ltd. (PT-433 at T0004605)

Imar Finansal Kiralama (PT-437 at 67)

Incidentally Ltd. (PT-435, Appendix 4, at 14-15)

Inter Televizyon Servisleri (PT-437 at 288)

Isaac Ltd. (PT-435, Appendix 4, at 14)

Istanbulspor Spor Faaliyetleri AS (PT-232 at 9)

Jordan Public Payphones (PT-435, Appendix 4 at 9-10)

Joy FM (PT-232 at 8)

Kepez Elektrik (PT-437 at 318)

Keps Kurumsal Telekom Hzm (PT-437 at 313)

Kingsbury Holding and Investment N.V. (PT-435, Appendix 4 at 6-7; PT-304; PT-336)

Klasik Insaat ve Ticaret (PT-437 at 124)

Klavama B.V. (PT-435, Appendix 4 at 16)

Kral FM (PT-232 at 8)

Kral TV (PT-232 at 8)

Kristal Insaat ve Ticaret (PT-437 at 130)

Kutup Produksiyon ve Filmcilik AS (PT-232 at 9)

Ledranet Operations Ltd., Internet Services/Kibrisbee (PT-232 at 8)

Lismas Liman Isletmeleri AS (PT-232 at 9)

Lokum FM (PT-232 at 8)

Mavi Reklamcilik AS (PT-232 at 9)

Mavi Turizm Yatirimlari Ticaret AS (PT-437 at 218)

Media Print Basim Ticaret AS (PT-437 at 48)

Medya Park Yayincilik Sanayi AS (PT-437 at 209)

Merkez Cimento Terminali Isletmeleri (PT-437 at 170)

Merkez Hazir Beton Imalat (PT-437 at 57)

Merkez Kagit Torba (PT-437 at 54)

Merkez Nakliyat (PT-232 at 9)

Merkez Yatirim ve Ticaret (PT-437 at 100)

Metas Izmir Metalurji (PT-232 at 9)

Metro FM (PT-232 at 8)

Netbul Internet Hzm ve Pazarlama Ticaret AS (PT-437 at 311)

O2 Oksijen Teknoloji Gelistirme ve Bilism Sis (PT-437 at 213)

Pal Produksiyon Hzm (PT-437 at 155)

Pamukova Telekom (PT-437 at 5)

Park Medya Reklancilik (PT-232 at 9)

Park Reclamcilik Filmcilik ve Pazarlama (PT-437 at 87)

Prime Holding AS (PT-437 at 183)

Polaris Produksiyon ve Filmcilik AS (PT-232 at 9)

Profil Insaat ve Ticaret AS (PT-437 at 246)

R.T. Net Internet Hzm ve Pazarlama Ticaret AS (PT-437 at 304)

Radio Blue (PT-232 at 8)

Ritmo Latino (PT-232 at 8)

Rumeli Bank, Ltd. (PT-232 at 9)

Rumeli Celik Sanayi AS (PT-437 at 264)

Rumeli Cimento Ihracat (PT-437 at 11)

Rumeli Cimento Sanayi ve Ticaret (PT-437 at 96)

Rumeli Cimento Terminali Sanayi (PT-437 at 156)

Rumeli Elektrik (PT-437 at 160)

Rumeli Finansal Hizmetleri AS (PT-232 at 9)

Rumeli Hava Tasimacilik ve Isletmecilik (PT-437 at 169)

Rumeli Hayat Sigorta AS (PT-437 at 250)

Rumeli Holding (PT-437 at 212)

Rumeli Metal (PT-437 at 151)

Rumeli Sigorta (PT-437 at 150)

Rumeli Tanitim (PT-437 at 136)

Rumeli Teknik Komunikasyon Hzm AS (PT-437 at 10)

Rumeli Telefon (PT-437 at 1)

Rumeli Telekom (PT-437 at 193)

Rumeli Telekom Artel Azerbaijan Data Services (PT-232 at 8)

Rumeli Telekom Atkif Kablo A.S. (PT-232 at 8)

Rumeli Telekom JPPS/Jordan Pay-Phone Services (PT-232 at 8)

Rumeli Telekom Webbee Internet Services (PT-232 at 8)

Rumeli Yazilim (PT-437 at 34)

Sanal Icerik Iletism Hzm Ticaret AS (PT-437 at 308)

Sanart Produksiyon Yapim Ticaret (PT-437 at 145)

Sanliurfa Cimento Sanayii Turk (PT-437 at 147)

Silikon Grafik Tanitim AS (PT-232 at 9)

Simetri Cimento (PT-437 at 225)

Simetri Elektrik Yatirimi (PT-437 at 221)

Simetri Hava Yollari Yatirim (PT-437 at 234)

Simetri Holding (PT-437 at 230)

Simetri Insaat (PT-437 at 236)

Sistem Direk Pazarlama (PT-437 at 197)

Sistem Ticaret ve Insaat (PT-437 at 120)

Standart Aluminyum Sanayi AS (PT-437 at 262)

Standart Beton Sanayi AS (PT-437 at 29)

Standart Cimento Sanayi AS (PT-437 at 19)

Standart Elektrik Sanayi AS (PT-437 at 23)

Standart Holding AS (PT-437 at 38)

Standart Insaat ve Ticaret (PT-437 at 163)

Standart Metal Sanayi AS (PT-437 at 26)

Standart Pazarlama AS (PT-437 at 301)

Standart Telekom (PT-437 at 205)

Star Digital (PT-232 at 8)

Star Digital Interactif (PT-437 at 201)

Star Telekom (PT-437 at 244)

Star Televizyon Hzm AS (PT-437 at 294)

Super FM (PT-232 at 8)

Super Musik AS (PT-232 at 9)

Teknik Yapi AS (PT-437 at 167)

Telsim Cagri Hzm (PT-437 at 77)

Telsim Mobil Telekomunikasyon (PT-437 at 273)

Ticaret Unvani Ladik Cimento (PT-437 at 107)

Toros Insaat Sanayi ve Yatirim (PT-437 at 259)

Turizm Endustrisi Yatirim (PT-437 at 69)

Ultra Filmcilik ve Raklamcilik Sanayi ve Ticaret AS (PT-437 at 281)

Ulus Factoring AS (PT-437 at 251)

Unitel Telefon Pazarlama AS (PT-437 at 269)

Utterton Ltd. (PT-435, Appendix 4, at 10)

Van Cimento Sanayii (PT-437 at 104)

Wisteria Bay Ltd. (PT-435, Appendix 4, at 13)

Yapi ve Ticaret (PT-123, PT-124, PT-134, PT-146, PT-147, PT-148, PT-168)

126. Kemal Uzan currently owns shares in at least fifty-seven of these companies; Cem Uzan currently owns shares in at least sixty-nine of them; Akay currently owns shares in at least sixty-two of them; Melahat Uzan currently owns shares in at least forty-two of them; and Hakan Uzan currently owns shares in at least seventy-four of them.

127. Rumeli Holding, established by Kemal Uzan (its chairman) and in which each member of the Uzan family owns shares, is the primary corporate entity through which the Uzans conduct their business. By the mid-1990s, Rumeli Holding had grown into a major Turkish conglomerate, with dozens of subsidiary companies, all of which are controlled by the Uzans. *See* PT-232 (Rumeli Holding

Annual Report) at 8-9; Answer ¶ 24; PT-437 (index of Turkish companies).

128. Rumeli Holding is comprised of "six fundamental core sectors": the Energy Sector; the Communications Sector; the Media and Entertainment Sector; the Indus[illegible]l Sector; the Finance Sector; and the Investment Sector. P[illegible]-232 (Rumeli Holding Annual Report) at 8-9, 12.

129. The Rumeli Holding Annual Report describes the structure of Rumeli Holding as follows:

> The different sectors have various groups under them, which are either directly or indirectly owned by the various companies in their respective sectors. Although Rumeli Holding does not have a direct holding ownership structure, the companies under the various sectors are either owned by the leading sector company or by the family shareholders. Essentially, Rumeli Holding and all of its companies are a family owned group of companies. A few of the core companies are publicly traded and the family owns the controlling majority in all the companies ranging from 85% in the publicly traded companies to 100% in the non-traded companies.

PT-232 (Rumeli Holding Annual Report) at 12; *id.* (list of companies covered by report) at 8-9.

130. Kemal Uzan, the father, still exercises an overall control of the Rumeli Group of companies and few significant decisions are made without his involvement or consent. As Thomas Brunner, the Uzans' personal banker at UBS, testified: "I believe all those [Uzan companies] are somehow within the Rumeli Holding, which is controlled in essence by the family patriarch, Mr. Kemal Uzan." *See* PT-442 (Thomas Brunner Deposition) at 27, 56 (testifying that Kemal Uzan discussed Telsim's performance with Brunner and that Brunner understood that Kemal Uzan ultimately controlled Telsim).

131. Kemal Uzan's sons, Cem and Hakan, are responsible for the day-to-day management of many of the family's companies. Cem Uzan, for instance, is responsible for the family's media and energy interests, *see* PT-436 (Responses to MCC Requests to Admit) at Response No. 60; PT-47 (Risk Advisory Report describing Uzan family structure) at ML241, while Hakan Uzan is responsible for the family's telecommunications businesses, *see* PT-436 (Responses to MCC Requests to Admit) at Response No. 59; PI-33 (Rumeli Telefon board resolution); PT-233 (Telsim marketing brochure); PT-459 (Hakan Uzan testimony at contempt hearing) at 4.

132. In addition, defendant Akay holds or has held various officer and director positions within the Uzans' business empire, *see* PI-26 (Rumeli Telefon board resolution); PI-29 (Standart Telekom articles of incorporation); PI-30 (Telsim board of directors resolution); PT-178 (Rumeli Cimento charter); PT-186 (UBS power of attorney for Telsim), and defendant Melahat Uzan is listed as a founder of Rumeli Cimento, one of the Uzans' key companies, and was an initial shareholder of Rumeli Telekom, *see* PT-176; PT-178; PT-179.

133. Defendant Luna has extensive involvement with the Uzans' family businesses and serves as the Uzans' prime assistant. *See* PT-151 (handwritten notes on Luna as assistant); PT-458 (Fatih Azami testimony at PI hearing) at 803. Luna carries a business card with the title "Director International" of Rumeli Group, which lists a Telsim email address, and he was present at Telsim's business meetings with MCC. *See* PT-458 (Edward Hughes testimony at PI hearing) at 10-11; C-137 (Luna business card); PT-1135 (Luna letter to Nokia). Luna also serves as a director of many "offshore" companies owned by the Uzans, including Hawk Aviation, EMS, and Novabrands, *see* PT-468 (listing of Hawk Aviation directors); PT-311 (power of attorney for EMS); PT-361 (Dun & Bradstreet report for EMS); PT-305

(Curacao Commercial Register report for Novabrands), and is an officer of Star TV and Rumeli USA, American corporations funded by the Uzans, *see* PT-450 (Luna Decl.) ¶¶ 2-4.

Joint-Decision Making and Control by the Uzan Family

134. The Uzan family jointly runs the various companies that it owns and controls. Indeed, the family—defendants Kemal Uzan, Melahat Uzan, Hakan Uzan, Cem Uzan, and Aysegul Akay—gathers regularly to discuss their business affairs and to make business decisions. *See* PT-458 (Edward Hughes testimony at PI hearing) at 59. As Edward Hughes testified:

> [Hakan Uzan] told us that the family was very close and that they would run all the businesses, and he said, I think it was every Sunday or Friday, I'm not sure now, they would have a dinner as a family and during dinner and after dinner they would review the financials and business decisions of all of their companies. He said deals that were made between them as a family were signed with MOUs between themselves to guarantee what was agreed on.

PT-458 (Edward Hughes testimony at PI hearing) at 59.

135. Similarly, Ernst Kramer stated that business decisions concerning Uzan-controlled companies were made by the Uzans "in Sunday evening dinners between members of the family." PT-458 (Ernst Kramer testimony at PI hearing) at 423. Mr. Kramer relayed the following description of these dinners as conveyed to him by Hakan Uzan:

> It was at the house of the parents. So Kemal was there, his wife would participate, and Cem and Hakan, and the sister will participate if available as well. It was stated that it was, you should have a highly valid reason that you could not be at that dinner meeting.

PT-458 (Ernst Kramer testimony at PI hearing) at 423.

136. In dealing with MCC, Hakan Uzan was the principal negotiator for Telsim, but he made "constant" phone calls to Cem Uzan to get his input. Kemal Uzan also took an active role in the negotiations, securing a $300 million loan from UBS toward Telsim's purchase of a GSM license from the Turkish government. Major decisions regarding Telsim, such as the decision to sell part of the company, also required Kemal Uzan's approval. *See* PT-458 (Edward Hughes testimony at PI hearing) at 10-11, 27-29, 58-59; *see also* PT-458 (Edward Hughes testimony at PI hearing) at 10-11; PT-131 (UBS loan commitment report); PT-436 (Responses to MCC Requests to Admit) at Response Nos. 220, 221, 222.

137. In dealing with Nokia, Hakan Uzan was the principal negotiator; however, "he made it clear that [a Telsim business decision] was a family decision." Hakan Uzan would frequently leave negotiations to discuss a particular issue with Cem Uzan, while major business decisions (such as a Telsim share pledge) required Kemal Uzan's approval. Hakan Uzan also would frequently make telephone calls to Cem Uzan during the course of negotiations to consult with him. *See* PT-458 (Ernst Kramer testimony from PI hearing) at 420-23; PT-1193 (Declaration of Ernst Kramer dated January 28, 2002 ("Kramer Decl. dated January 28, 2002")) ¶ 7.

138. Merrill Lynch, which served as Telsim's financial advisor during a large part of the period here relevant, recognized that all major decisions required the agreement of Hakan, Cem, and Kemal Uzan. *See* PT-445 (Paul Raphael Deposition) at 29; PT-444 (Sean Carney Deposition) at 13-14. Representatives of Chase Bank, working on a possible high yield debt bond issuance for Telsim, realized that although primary responsibility for the day-to-day operations of the company rested with Hakan Uzan, Kemal Uzan and other members of the Uzan family still had

a significant interest in the company. *See* PT-443 (Nikola Sutherland Deposition) at 54-55.

Family Control Over Relevant Companies

139. As a general matter, the Uzans ensure family control of the companies in their enterprise by appointing members of their family to positions on the boards of directors of these companies. As described by Hakan Uzan:

> [The board of directors is] an honorary position, your Honor. The board of directors of the company doesn't really do any day-to-day work. It's just an honorary position. And instead of putting somebody who is not from the family, we put family members there.

PT-459 (Hakan Uzan testimony at contempt hearing) at 9, 11.

140. Members of the board rubber stamp the joint decisions made by the family. As Hakan Uzan testified:

> I mean, for example, I am on the board of directors [of Telsim], the chairman. I will ask our lawyers or our in-house people who do these things to draft up, and then I will ask my sister or whoever is on the board to sign it, and they will sign it because I am putting it in front of them.
>
> . . . .
>
> My sister will do whatever I show her and ask her to do. She is just there [on the board of directors] as a name. It can be any other name. I can change and put any other person there for that matter, so it's not—it doesn't have to be my sister.

PT-459 (Hakan Uzan testimony at contempt hearing) at 9, 11.

141. Moreover, Hakan Uzan testified at the contempt hearing that corporate formalities are not followed with respect to the keeping of the books and records of the

company. He stated that even if Telsim's shareholders or board of directors were to take action with respect to Telsim's stock, such action could not be carried out because he keeps Telsim's books and records in his personal possession. *See* PT-459 (Hakan Uzan testimony at contempt hearing) at 30.

Telsim

142. Telsim, an Uzan-controlled company, is the second largest supplier of cellular phone service in Turkey. A majority (over 99%) of Telsim is owned by the following Uzan-owned companies: Standart Telekom (66.48%); Rumeli Telefon (24.54%); Rumeli Holding (7.33%); Rumeli Elektrik (0.87%); and Pamukova Telekom (0.34%). *See* PI-36 (Telsim shareholder meeting report dated April 24, 2001).

143. Kemal Uzan was the President and Chairman of Telsim as of January 25, 2002. *See* PI-459 (Hakan Uzan testimony at contempt hearing) at 13. Cem Uzan is a director and Vice President of Telsim. Akay is a director of Telsim. Hakan Uzan is a director, Chief Executive Officer ("CEO"), and chair of the Executive Committee of Telsim, and also primarily responsible for the day-to-day operations of the company. Although Luna has no known title, he carries a business card with a Telsim email address and was involved in Telsim's negotiations with MCC. *See* PT-436 (Responses to MCC Requests to Admit) at Response Nos. 58, 59, 60, 61, 68; PT-458 (Edward Hughes testimony at PI hearing) at 10-11; *see also* PI-36 (Telsim shareholder meeting report dated April 24, 2001); PT-459 (Hakan Uzan testimony at contempt hearing testimony) at 4.

144. Defendants have not materially disputed that the Uzan family controlled the affairs of Telsim at all relevant times.

145. On August 22, 1997, Cem Uzan, Hakan Uzan, and Akay all participated in a Telsim board meeting during which a capital increase was approved, financial statements were reviewed, and Cem Uzan, Hakan Uzan, and Akay were reelected to Telsim's board. *See* PT-184 (Telsim board minutes).

146. On April 22, 1998, Cem Uzan, Hakan Uzan, and Akay participated in and signed Telsim board resolutions authorizing the original Equipment Financing and Security Agreement ("Equipment Financing Agreement") and the Share Pledge Agreement with MCC, and authorizing the certification of shares to comply with the Share Pledge Agreement. *See* PT-188, 189, 190 (Telsim board resolutions).

147. On July 13, 1999, Kemal Uzan, Cem Uzan, Hakan Uzan, and Akay participated in board decisions authorizing an increase of the financing under the Equipment Financing Agreement with MCC from $360 million to $590 million and increasing Telsim's guarantee of the Kar-Tel loan. *See* PT-193, 194 (Telsim board resolutions).

148. On October 11, 1999, Kemal Uzan, Cem Uzan, Hakan Uzan, and Akay participated in an annual shareholders meeting where the officers and board members of Telsim were elected. At that meeting, Kemal Uzan, Cem Uzan, Hakan Uzan, Akay, and Yavuz Uzan were elected to the Telsim board. *See* PT-196 (Telsim shareholders meeting minutes).

149. On October 18, 1999, Kemal Uzan, Cem Uzan, Hakan Uzan, and Akay participated in a board meeting during which Telsim granted signatory authority to Kemal Uzan, Cem Uzan, and Hakan Uzan. *See* PT-197 (Telsim board minutes).

150. On November 30, 1999, Kemal Uzan, Cem Uzan, Hakan Uzan, and Akay participated in and signed the Telsim board approval of the Fifth Amendment to the

Equipment Financing Agreement, the Second Amendment to the License Financing and Security Agreement ("License Financing Agreement"), and the renewal of the Kar-Tel facility. *See* PT-198, 199 (Telsim board resolutions).

151. On January 20, 2000, Kemal Uzan, Cem Uzan, Hakan Uzan, and Akay participated in and signed the Telsim board approval of the Seventh Amendment to the Equipment Financing Agreement and voted to approve the certification of Telsim stock so that Rumeli Telefon could comply with the increase of the shares pledge to MCC from 51% to 66% of Telsim's stock. *See* PT-200 (Telsim board resolution); PI-31, 32 (Telsim board resolutions).

152. On March 8, 2000, Kemal Uzan, Cem Uzan, Hakan Uzan, and Akay participated in and signed a Telsim board decision approving the ABN-AMRO Bank, N.V. ("ABN-AMRO Bank") share pledge agreement with Nokia, and approving the pledge of over 646,200 shares of Telsim stock to ABN-AMRO Bank. *See* PT-205 (Telsim board decision); PT-10031 (Telsim board decision).

153. On May 22, 2000, Kemal Uzan, Cem Uzan, Hakan Uzan, and Akay participated in and signed Telsim board resolutions approving the issuance of provisional share certificates in connection with the share pledge to Nokia and approving a share pledge agreement with ABN-AMRO Bank. *See* PT-209 (Telsim board resolutions); PT-210 (Telsim board resolutions); PT-1004M (Telsim board resolution).

154. On July 24, 2000, Kemal Uzan, Cem Uzan and Hakan Uzan participated in a Telsim board decision approving new agreements with MCC regarding Telsim's guarantee of the Kar-Tel facility. *See* PT-230 (Telsim board resolution).

155. On September 29, 2000, Kemal Uzan, Cem Uzan, Hakan Uzan, and Akay participated in and signed a Telsim board resolution approving the Eighth Amendment to the

Equipment Financing Agreement, authorized Hakan Uzan to sign the agreement, and affirmed Telsim's guarantee of the Kar-Tel loan. *See* PI-34 (Telsim board resolutions); PI-35 (Telsim board resolutions).

156. On March 27, 2001, Cem Uzan, Hakan Uzan, and Akay participated in a board resolution designating the persons authorized to sign documents on Telsim's behalf. *See* PT-215 (Telsim board resolution).

157. On April 25, 2001, Cem Uzan, Hakan Uzan, and Akay participated in and signed a board resolution authorizing an increase in Telsim's capital and the exercise of preferential rights in a deliberate effort to dilute and eviscerate the collateral shares pledged to MCC and Nokia. *See* PT-216 (Telsim board resolution).

Rumeli Telefon

158. Rumeli Telefon, which held a majority of Telsim when Telsim was incorporated, and continued to hold a majority of Telsim's stock until the April 24, 2001 dilution meeting, also is controlled by the Uzans. Ninety-six percent of Rumeli Telefon's stock is owned by Kemal Uzan (24%), Hakan Uzan (24%), Cem Uzan (24%), and Akay (24%). *See* C-145 (Turkish Trade Register Gazette article dated May 18, 1993); PT-436 (Responses to MCC Requests to Admit) at Response Nos. 124-28.

159. Hakan Uzan, as Vice Chair and CEO of Rumeli Telefon, signed the Equipment Financing Agreement, the Share Pledge Agreement and the amendments thereto on its behalf. *See* PT-436 (Responses to MCC Requests to Admit) at Response Nos. 76, 86.

160. The Rumeli Telefon articles of incorporation were approved and signed by Kemal, Cem and Hakan Uzan. *See* PT-226 (Rumeli Telefon articles of incorporation).

161. Rumeli Telefon corporate documents during the relevant time period show that the Uzan family was

collectively responsible for its business decisions in this case.

162. For example, on April 20, 1998, Hakan Uzan and Akay participated in Rumeli Telefon board resolutions that authorized the pledge of shares to MCC in connection with the Equipment Financing Agreement and authorized Hakan Uzan to execute the Share Pledge Agreement on behalf of Rumeli Telefon. *See* PI-26 (Rumeli Telefon board resolution); PI-27 (Rumeli Holding board resolution).

163. On September 30, 1999, Cem Uzan, Hakan Uzan and Akay participated in the Rumeli Telefon shareholders meeting during which they elected themselves to the board of directors. *See* PT-195 (Rumeli Telefon shareholder meeting minutes).

164. On January 20, 2000, Cem Uzan, Hakan Uzan, and Akay participated in and signed Rumeli Telefon board resolutions to increase Rumeli Telefon's share pledge in connection with the Seventh Amendment to the Equipment Financing Agreement and designating Rumeli Telefon's authorized signatories. *See* PI-28 (Rumeli Telefon board resolutions); PT-203, 204 (Rumeli Telefon board resolutions).

165. On March 8, 2000, Kemal Uzan, Cem Uzan, Hakan Uzan, and Akay participated in and signed a Rumeli Telefon board resolution approving the pledge of Telsim shares to ABN-AMRO Bank in connection with the Nokia-Telsim financing agreement. *See* PT-205, 206 (Rumeli Telefon board resolutions).

166. On May 23, 2000, Kemal Uzan, Cem Uzan, Hakan Uzan, and Akay participated in and signed a Rumeli Telefon board resolution approving a modification of the ABN shareholders agreement. *See* PT-211 (Rumeli Telefon board resolution).

167. On September 29, 2000, Cem Uzan, Hakan Uzan, and Akay participated in and signed a Rumeli board

resolution to increase Rumeli Telefon's pledge of Telsim stock to MCC in connection with the Eighth Amendment to the Equipment Financing Agreement. *See* PI-33 (Rumeli Telefon board resolution).

Standart Telekom

168. Collectively, 98.8% of the stock of Standart Telekom is owned by Hakan Uzan (197 shares, 39.4%), Cem Uzan (197 shares, 39.4%), and Akay (100 Shares, 20%). *See* Plaintiffs' separately marked trial exhibit C ("C") 144 (Standart Telekom shareholder registry).

169. Hakan Uzan, Cem Uzan, and Akay were listed as incorporators and signed the Standart Telekom articles of incorporation in January 2000. Hakan Uzan and Cem Uzan were named directors of Standart Telekom in its articles of association. *See* PI-29 (Standart Telekom articles of incorporation).

170. Hakan Uzan, Cem Uzan, and Akay signed the Telsim shareholders' resolutions of April 24, 2001, which amended Telsim's articles of association to triple the number of authorized shares of Telsim, reflecting Standart Telekom's increase in ownership of Telsim from 0.32% of Telsim's stock to more than 66% of Telsim's stock. *See* PT-436 (Responses to MCC Requests to Admit) at Response Nos. 141-43.

Control of Corporate Finances and Ability to Divert Proceeds

171. UBS bank documents show that the Uzans collectively controlled the funds in both their personal accounts and in the corporate accounts of the various companies controlled by the Uzan family, giving them ample opportunity to divert funds from one entity to another, as well as into their own pockets.

172. Kemal Uzan, Melahat Uzan, Cem Uzan, Hakan Uzan, and Akay are all signatories to the Rumeli Cimento charter agreement and the registration of that charter, dated December 10, 1992. *See* PT-176 (Rumeli Cimento Charter Agreement); PT-178 (Registration and Approval of the Rumeli Cimento Charter Agreement). Kemal Uzan had authority to sign checks and make withdrawals from those accounts. Cem Uzan, Hakan Uzan and Akay all were designated as additional signatories to the Rumeli Cimento accounts, and any two of them could sign to issue checks or make withdrawals from those accounts. *See* PT-177 (Rumeli Cimento corporate resolution regarding UBS accounts).

173. The same signatory authorities applied to the two Rumeli Cimento accounts opened at UBS New York in 1997, with Kemal Uzan able to sign checks and make withdrawals upon his own signature, and Hakan Uzan, Cem Uzan, and Akay permitted to sign checks and make withdrawals so long as two of the three of them signed the necessary papers. *See* PT-180 (account opening); PT-182 (account master agreement).

174. Kemal Uzan, Melahat Uzan, Cem Uzan, Hakan Uzan, and Akay are all signatories to the certificate of incorporation for Rumeli Telekom dated August 26, 1993. In the certificate, all are listed as "foundation shareholders." *See* PT-179 (Rumeli Telekom certificate of incorporation).

175. Kemal Uzan, Cem Uzan, Hakan Uzan, and Akay all had signatory authority over Kemal Uzan's personal account with UBS New York. Again, Kemal Uzan could transact business upon his own signature. Alternatively, signatures from any two of the other signatories (Hakan Uzan, Cem Uzan, and Akay) were required for the transaction of business on this account. *See* PT-181 (account master agreement).

176. Kemal Uzan, Cem Uzan, Hakan Uzan, and Akay all had signatory authority over Telsim's account with UBS New York. Although Kemal Uzan has claimed to have little to do with Telsim's affairs, he was the only one of the four signatories who could transact business with respect to Telsim's account upon his own signature. *See* PT-185 (account master agreement); PT-186 (power of attorney).

177. Kemal Uzan, Cem Uzan, Hakan Uzan, and Akay all had signatory authority over Rumeli Telekom's account with UBS New York. As with the other Uzan-controlled accounts, Kemal Uzan could transact business on this account upon his own signature, while two signatures from the other signatories (Hakan Uzan, Cem Uzan, and Akay) were required for them to transact business without Kemal Uzan's signature. *See* PT-191 (account master agreement); PT-192 (client commercial profile).

178. Kemal Uzan, Cem Uzan, and Hakan Uzan all are listed as key client contacts on Yapi's UBS commercial client profile. In addition, a due diligence memo on Yapi discusses Kemal Uzan's and Hakan Uzan's roles within the company. Kemal Uzan is described as the owner of Yapi and the chairman of Imar Bank. Hakan Uzan is described as "very active in his father's business." *See* PT-134 (commercial client profile); PT-168 (due diligence memo).

179. An extensive series of Client Visit and Call Reports maintained by UBS show that the Uzans, and in particular Kemal Uzan, ran their individual companies as a large collective enterprise. For example, a facsimile from Thomas Brunner to Kemal Uzan dated May 23, 1996 shows Kemal Uzan negotiating a loan for the purchase of printing presses from Rockwell. *See* PT-146 (facsimile dated May 23, 1996 from Thomas Brunner to Kemal Uzan).

180. In a report dated July 10, 1997, the Uzans' personal banker at UBS New York notes that Kemal Uzan agreed to send financial statements for his companies, "Yapi ve

Ticaret and the Holding, Rumeli Holding, Inc." The report further discusses the "entire organization, controlled by Kemal Uzan, who is known to be one of Turkey's richest and most influential men." *See* PT-148 (client visit report dated July 10, 1997).

181. A client report dated October 7, 1997 notes that Kemal Uzan visited UBS New York and withdrew $10,000 from the Yapi account. Kemal Uzan also discussed the Rumeli electric companies and Telsim. In particular, Kemal Uzan discussed his desire to purchase a GSM license from the Turkish government and the possibility that he might "borrow against his assets" on deposit with UBS to finance the license. PT-147 (client visit report dated October 7, 1997).

182. A client report dated December 30, 1997 notes that Kemal Uzan visited UBS New York and once again made a $10,000 withdrawal from the Yapi account. On this visit, Kemal Uzan also provided instructions about two transfers from Rumeli accounts. Kemal Uzan also "reiterated that he will have to raise capital ($500 million) in the upcoming months in order to continue to build up their cellular company 'TELSIM.'" PT-145 (client visit report dated December 30, 1997).

183. A client report dated April 2, 1998 notes that Kemal Uzan visited UBS New York and withdrew $10,000 but the main purpose of his visit was to discuss a $300 million loan facility he sought in order to finance part of the cost of Telsim's GSM license. *See* PT-148 (client visit report dated April 2, 1998).

184. In a client report dated March 4, 1999, accounts for Yapi, Telsim, Rumeli Telekom, Rumeli Cimento, Kemal Uzan, Yavuz Uzan, Cem Uzan, and Hakan Uzan are all listed as "clients" with respect to a visit with Kemal Uzan. In the report, UBS representatives note Kemal Uzan's discussion of the financial health of "the Uzan Group,"

including the group's overall investment strategy. The report mentions that "the Uzan family" had lost money in the fall of 1998 in its construction sector. Kemal Uzan also discussed the $300 million loan to Telsim and Cem Uzan's and Hakan Uzan's responsibilities in running several of the Uzan family businesses. *See* PT-123 (client visit report dated March 4, 1999).

185. An email from Alfred Frank of UBS Zurich describes a meeting with Kemal Uzan during which Kemal Uzan signed personal financial documents and discussed "the industrial interests of his group." In particular, Kemal Uzan told Mr. Frank that, with respect to Telsim, "he invested $1.5 billion and that he could achieve a better return with placing the money in Repos or on overnight funds in Turkey." PT-125 (email dated September 13, 1999 from Alfred Frank to Thomas Brunner).

186. In a client report dated March 20, 2000, accounts for Yapi, Rumeli Telekom, Rumeli Cimento, Kemal Uzan, Yavuz Uzan, Cem Uzan, and Hakan Uzan are all listed as "clients" with respect to a visit with Kemal Uzan. According to this report, Kemal Uzan discussed the status of "his business conglomerate," including the financial status of Telsim. He also reviewed the successes of the Uzan-controlled construction companies, electric companies, and banks in the prior year. *See* PT-124 (client visit report dated March 20, 2000).

187. Other defendants similarly had multiple contacts with UBS New York where they, like Kemal Uzan, treated the various Uzan-controlled companies as a single enterprise. A client contact report dated April 24, 1999 described a visit by Hakan Uzan and Luna to UBS New York. Thomas Brunner described Hakan Uzan's representations about Telsim's performance as follows:

> He is doing extremely well, business is expanding rapidly and TELSIM is now at about 40% of the

> Turkish Cellular market. Many foreign telecommunications companies interested in a merger or takeover are approaching them. However, the Uzans have absolutely no interest, whatsoever, to sell their enterprise. Hakan Uzan keeps himself busy looking to purchase GSM licenses in neighboring countries in order to continue their successful expansion . . . . In order to save time he now commutes from his home to the office via a private helicopter.

See PT-172 (client visit report dated April 24, 1999).

188. A client contact report dated November 28, 2000 describes Luna as an executive of Rumeli Holding, a "Turkish conglomerate, owned by the Uzan Family," and as someone who works closely with Hakan Uzan. PT-158 (client contact report dated November 28, 2000).

189. The Uzans' control of the finances of so many companies provided endless opportunities to divert funds from one company to another as well as to divert funds to pay for the Uzans' personal expenditures. Moreover, by their own admission, the Uzans commingle their personal and business expenses and do not keep track of which is which.

190. Thus, as Hakan Uzan testified during the contempt hearing, he and Cem Uzan took $8 million "[f]rom our companies" to pay the deposit on luxury apartments in New York. PT-459 (Hakan Uzan testimony at contempt hearing) at 97. Hakan Uzan also admitted to Motorola, Inc. and MCC executives that he had claimed an urgent need for Telsim to borrow $35 million from MCC in cash in December 2000 when in reality the Uzans wanted to use it to pay for apartments they were purchasing in New York. As described by Edward Hughes:

> We met with [Hakan Uzan] in Istanbul and told him that we had recently read an article in th[illegible], I think it was the Washington Post, that he had acquired an apartment for $35 million. I think actually the article

> said $38 million, in New York. I said it seemed coincidental to me that that was approximately the same amount of money that you were asking for. Hakan kind of smiled sheepishly and said, We were hoping you guys didn't find that out.

PT-458 (Edward Hughes testimony at PI hearing) at 58.

191. Similarly, Cem Uzan provided a sworn statement to the English courts in which he stated:

> I enjoy substantial salaries, benefits and corporate privileges that are associated with, and derive from, my shareholdings. These enable me to enjoy the lifestyle that has captured the imagination of the Claimants. This includes, but is not limited to, travel, meals, and accommodation. Beyond this, it is not necessary for me to have any substantial possessions or real property, as my needs are catered for largely by my business associations.

PT-447 (Cem Uzan witness statement in English proceeding) ¶ 12.

192. Kemal Uzan expressed a similar sentiment:

> I have interests across a wide range of commercial enterprises and, therefore, it is impossible for me to accurately list all of my assets, the value of which is higher than £10,000 without allocating three or four persons for a period of 6-9 months to specifically identify all such assets.

PT-448 (Kemal Uzan witness statement in English proceeding) ¶ 2.

The Initial Fraudulent Inducement

193. In 1993, Telsim entered into an agreement with the Turkish government, permitting Telsim to provide GSM cellular telephone services. One year later, the Uzans launched the company's telecommunications business. *See* PT-233 (Telsim marketing materials) at 1.

194. Prior to negotiating and entering into the various loan agreements with MCC that are the subject of MCC's fraud claims, Telsim entered into a smaller-scale agreement with Motorola Ltd. on November 29, 1994 (the "Concession Agreement"). Pursuant to this Concession Agreement, Motorola Ltd. provided cellular infrastructure equipment to Telsim that was partly paid for by Telsim with a series of promissory notes. *See* PT-458 (Edward Hughes testimony at PI hearing) at 9; PT-436 (Responses to MCC Requests to Admit) at Response Nos. 63-65.

195. The total debt under promissory notes, which were issued in several different currencies, grew to approximately $52.5 million (based on conversion rates in effect on January 18, 2002). Telsim made its payments under the promissory notes in a more or less timely manner. *See* PT-458 (Edward Hughes testimony at PI hearing) at 9; PT-436 (Responses to MCC Requests to Admit) at Response No. 65. Defendants thus established a relationship of trust with Motorola, Inc. and its affiliates, justifying MCC in relying on defendants' later representations and promises.

196. Beginning in 1998, Motorola, Inc. and Telsim began to exchange information and to engage in negotiations concerning the possibility of Motorola, Inc. and its affiliates providing Telsim with a cellular telephone system and related services, with MCC to provide the financing. *See* PT-458 (Edward Hughes testimony at PI hearing) at 9-10. As Telsim was one of only two licensed wireless communication providers in Turkey, MCC believed that Telsim was likely to receive a substantial market share of the Turkish cellular network when that network was eventually established. *See* PT-458 (Edward Hughes testimony at PI hearing) at 8-9, 13.

197. Throughout the dealings between MCC and Telsim, Hakan Uzan served as Telsim's principal negotiator, and Luna generally was also present. *See* PT-458 (Edward Hughes testimony at PI hearing) at 10-11. The two made

"constant" phone calls to Cem Uzan to get his input on the negotiations and potential agreement. *Id.* at 10. Fatih Azami, Telsim's CFO, also attended meetings. *Id.* The approval of Kemal Uzan was also often required. *See* PI-74 (email dated March 6, 2000 from Hakan Uzan to Murat Kircuval); PT-458 (Ernst Kramer testimony at PI hearing) at 422-423; PT-1193 (Kramer Decl. dated January 28, 2002) ¶ 7.

198. In April 1998, Hakan Uzan, Luna, and Fatih Azami met with Edward Hughes and other MCC representatives in London to discuss a potential financing agreement. During this meeting, Hakan Uzan made numerous phone calls to Cem Uzan for advice on the potential transaction. *See* PT-458 (Edward Hughes testimony at PI hearing) at 10.

199. Throughout these negotiations, the Uzans unequivocally represented that any and all monies received from MCC pursuant to the negotiated arrangements would go to Telsim. At no time did they reveal their true intent to divert substantial portions of these monies to other Uzan-controlled entities and/or to their personal benefit. Nor did they reveal their intent to never let MCC collect on any collateral pledged as security for MCC's financing.

200. At the same time, Kemal Uzan was negotiating with UBS New York for a $300 million loan toward the purchase price of a GSM License from the Turkish government. Kemal Uzan arranged for the additional funding for the license from UBS, pledging as security for the loan time deposits in his personal account in New York, along with time deposits held by two of Uzan-controlled companies, Yapi and Rumeli Cimento. *See* PT-458 (Edward Hughes testimony at PI hearing) at 11; PT-131 (UBS loan commitment report). Hakan Uzan relayed Kemal Uzan's activity in this regard to MCC. *See* PT-458 (Edward Hughes testimony at PI hearing) at 10-11; PI-59 (memorandum dated April 23, 1998 from Hakan Uzan to UBS).

201. On April 24, 1998, as a result of the aforementioned negotiations, MCC entered into the following series of agreements whereby MCC agreed to provide financing to Telsim: (1) the Equipment Financing Agreement (*see* DX-5) between Telsim and MCC; (2) the License Financing Agreement between Telsim and MCC (*see* Plaintiffs' trial exhibits separately marked as DX ("DX") at DX-3); (3) the Share Pledge Agreement between Rumeli Telefon and MCC (*see* DX-14); and the GSM Frame Contract ("Purchase Agreement") between Telsim, Motorola Ltd., and Motorola Turkey. Separately, MCC entered into an agreement to lend $73,723,000.99 to another Uzan-controlled entity, Kar-Tel, guaranteed by Telsim. Each of these agreements contained representations that the Uzan defendants who negotiated them knew were false and fraudulent.

The Equipment Financing Agreement

202. On April 24, 1998, MCC and Telsim entered into the Equipment Financing Agreement, which enabled Telsim to finance the purchase price of certain cellular infrastructure and equipment from Motorola Ltd. Under the original terms of the Equipment Financing Agreement, MCC loaned Telsim $360 million. *See* DX-5 (Equipment Financing Agreement); PT-458 (Edward Hughes testimony at PI hearing) at 12. Nowhere did the agreement indicate that any of the monies loaned thereby would be diverted to non-Telsim purposes.

203. Hakan Uzan, as Chief Executive Officer of Telsim, signed the Equipment Financing Agreement and each of the amendments to the Agreement on behalf of Telsim. Hakan Uzan also signed the amendments to the agreement on behalf of Rumeli Telefon, which pledged the majority of its shares in Telsim to MCC as security for the loans. *See* DX-5 to DX-13 (Equipment Financing Agreement and all

amendments thereto). Cem Uzan signed the Third and Fifth Amendments to the Agreement on behalf of Telsim. *See* DX-8 (Third Amendment to Equipment Financing Agreement); DX-10 (Fifth Amendment to Equipment Financing Agreement). Nowhere did these agreements indicate that the Uzans would never permit MCC to take control of the collateral.

204. In accordance with the terms of the Equipment Financing Agreement, Hakan Uzan sent to MCC a series of Draw Down Requests ("DDRs"), which requests allowed Telsim to draw down on the line of credit provided by MCC for the purchase of equipment from Motorola Ltd. In each such request, Hakan Uzan certified that all conditions precedent for the respective draw had been satisfied, including certifications that: (1) such funds would be used for payment for and installation of equipment and services; (2) no event of default had occurred under either the Equipment Financing Agreement or License Financing Agreement; and (3) Telsim was in compliance with all terms of the Equipment Financing Agreement and License Financing Agreement. In each such request, Hakan Uzan also restated the "representations, warranties, and covenants" set forth in the Equipment Financing Agreement as of the date of the DDR. *See* PT-30 (Telsim-MCC Draw Down Requests dated 1998-2000); PT-464 (Declaration of Edward Hughes dated February 7, 2003 ("Hughes Decl.")) ¶ 6. Again, nowhere in any of this was there indicated the Uzans' plan to divert the proceeds to non-Telsim purposes.

License Financing Agreement

205. On April 24, 1998, Telsim and MCC also entered into a License Financing Agreement, pursuant to which MCC agreed to lend Telsim $200 million toward Telsim's purchase of a 25-year GSM 900MHz nationwide cellular license, which license was required in order to operate a

GSM cellular system in the Republic of Turkey. Hakan Uzan, as CEO of Telsim, signed the License Financing Agreement on behalf of Telsim. *See* DX-3 (License Financing Agreement). MCC issued the loan in a single installment. *See id.*; PT-458 (Edward Hughes testimony at PI hearing) at 10-11; PI-59 (memorandum dated April 23, 1998 from Hakan Uzan to UBS).

206. Under the terms of the License Financing Agreement, Telsim was obligated to repay the loan with interest. But nowhere in the agreement was it disclosed that the Uzans intended to divert the proceeds to non-Telsim purposes.

Share Pledge Agreement

207. To secure the amounts loaned to Telsim under the Equipment Financing Agreement and the License Financing Agreement, MCC entered into the Share Pledge Agreement with another Uzan-controlled entity, Rumeli Telefon, which was then Telsim's majority shareholder. *See* PT-458 (Edward Hughes testimony at PI hearing) at 13-14; DX-14 (Share Pledge Agreement) at 2.

208. Under the original terms of the Share Pledge Agreement, Rumeli Telefon pledged 51% of Telsim's stock to MCC as collateral for the Equipment Financing and License Financing Agreements. *See* DX-14 (Share Pledge Agreement). Nowhere, however, was there disclosed the Uzans' intent not to permit this stock, or the control that accompanied it, to ever wind up in the hands of MCC. Moreover, because Telsim's financial statements were at all times overstated (a fact known to defendants but not to plaintiffs), the defendants misrepresented the value of the collateral even at the time the first loan was made.

Purchase Agreement

209. Also on April 24, 1998, Telsim, Motorola Ltd., and Motorola Turkey entered into the Purchase Agreement, pursuant to which Telsim agreed to purchase the above-described GSM cellular telephone system and services from the Motorola affiliates, and the Motorola affiliates agreed to provide warranty and support services for the system. *See* DX-1 (Purchase Agreement). Nowhere did the agreement disclose the Uzans' intent not to use the loans obtained under the License Financing Agreement to pay for the purchases.

210. Hakan Uzan, as Chief Executive Officer of Telsim, signed the Purchase Agreement on behalf of Telsim. *See* DX-1 (Purchase Agreement).

Kazakhstan Telephone Company ("Kar-Tel") Agreement

211. Kar-Tel is a cellular telecommunications company, owned and controlled by the Uzans, that operates in Kazakhstan. *See* PI-60 (letter dated August 19, 1998 from Hakan Uzan to MCC). On August 19, 1998, MCC loaned $60,000,000 to Kar-Tel toward the purchase of a $65,850,000 GSM license in Kazakhstan. *See* PT-464 (Hughes Decl.) ¶ 18. MCC transferred $60,000,000 in financing to UBS New York. This loan by MCC to Kar-Tel was guaranteed by Telsim. *See* PT-11 (Telsim guarantee of Kar-Tel loan).

212. In addition, MCC extended $13,723,000.99 to Kar-Tel to finance the purchase of equipment for Kar-Tel from Motorola Ltd., which loan was also guaranteed by Telsim. *See* PT-464 (Hughes Decl.) ¶ 19. In total, MCC extended $73,723,000.99 in financing to Kar-Tel, on which Kar-Tel has defaulted and Telsim as guarantor is obligated to repay. *See id.* ¶ 19.

213. Nowhere did the Kar-Tel agreements disclose that the Uzans intended to divert some of the loan proceeds to non-Kar-Tel purposes.

Subsequent Amendments to the Equipment Financing Agreement

214. The Equipment Financing Agreement subsequently was amended numerous times, in part to increase the amount of MCC's loan.

215. On August 19, 1999, MCC and Telsim entered into the Fifth Amendment to the Equipment Financing Agreement, which increased MCC's loan commitment from $360 million to $483 million. *See* DX-10 (Fifth Amendment to the Equipment Financing Agreement).

216. On September 20, 1999, MCC and Telsim entered into the Sixth Amendment to the Equipment Financing Agreement, which increased MCC's loan commitment to $683,161,875.57. The Sixth Amendment provided, *inter alia*, that $35 million of the loan increase was to be used for Telsim working capital. *See* DX-11 (Sixth Amendment to the Equipment Financing Agreement).

217. On February 1, 2000, MCC and Telsim executed the Seventh Amendment to the Equipment Financing Agreement. Under the Seventh Amendment, MCC increased its loan commitment to $1,133,161,875.57, an increase of $450 million. Specifically, the amendment provided for $175 million in equipment financing, $125 million for marketing programs, and $150 million for handsets. *See* DX-12 (Seventh Amendment to the Equipment Financing Agreement); PT-458 (Edward Hughes testimony at PI hearing) at 35-36.

218. Finally, on September 29, 2000, MCC and Telsim entered into the Eighth Amendment to the Equipment Financing Agreement, an agreement that increased MCC's loan commitment to $1,833,161,875.57, an increase of $700 million. The Eighth Amendment provided $250 million for infrastructure financing, $250 million for cash and marketing expenses, and $200 million for handset financing.

See DX-13 (Eighth Amendment to the Equipment Financing Agreement); *see also* PT-458 (Edward Hughes testimony at PI hearing) at 16-20; PT-436 (Responses to MCC Requests to Admit) at Response No. 112.

219. Neither in these Amendments nor in the negotiations thereof did the Uzans disclose that they had already diverted a portion of the previous loan proceeds to other entities and themselves and that they intended to make similar diversions with portions of the additional proceeds.

Subsequent Amendments to the Share Pledge Agreement

220. On February 1, 2000, the Share Pledge Agreement was amended to, *inter alia*, increase the percentage of Telsim stock pledged to MCC by Rumeli Telefon from 51% to approximately 66% of Telsim's outstanding shares. Hakan Uzan, the Vice Chairman and Chief Executive Officer of Rumeli Telefon and a member of Rumeli Telefon's board of directors, signed the Amended Share Pledge Agreement on behalf of Rumeli Telefon. *See* DX-15 (February 1, 2000 Amendment to Share Pledge Agreement) at 3, 9.

221. Previously, on July 2, 1998, MCC, Rumeli Telefon, and UBS had entered into a Pledgeholder Agreement (DX-18), pursuant to which MCC could only acquire the pledged collateral shares by agreement or by an award from a competent arbitration tribunal. However, on February 1, 2000, § 2.2 of the Pledgeholder Agreement was amended to allow MCC to foreclose on pledged shares by presenting evidence of default without the need for prior arbitration. *See* DX-19 (February 1, 2000 amendment to Pledgeholder Agreement) at 3-4; *see also* PT-458 (Edward Hughes testimony at PI hearing) at 167 (noting that as part of the amendment, defendants agreed to eliminate the "two-key" structure for default, so that MCC would not have to

arbitrate prior to foreclosing on the shares pledged to MCC).

222. The Share Pledge Agreement was again amended in September 2000 when the Eighth Amendment to the Financing Agreement was executed to enhance MCC's control of the pledged shares. The September 2000 Amendment again allowed MCC to foreclose on the shares by presenting evidence of default and without the need for prior arbitration and also removed from 36% of the pledged shares the restriction prohibiting MCC and its affiliates from bidding on the shares when sold by a marketer. *See* DX-16 (September 2000 Amendment to the Share Pledge Agreement).

223. Nowhere in these agreements did the Uzans, who negotiated them, or their companies, disclose that they intended never to let MCC take control of, or obtain the proceeds from, their shares.

Additional Misrepresentations Used to Help Obtain the Increased Funding

224. From 1999 through 2001, as part of their successful effort to induce MCC to provide additional funding, defendants repeatedly represented to MCC that they were working to obtain "ECGD"-backed loans, undertaking efforts to sell all or part of Telsim, and pursuing a high yield debt offering. The representations they made in these regards were materially false and fraudulent.

ECGD-Backed Financing

225. At a meeting on September 3, 1999, Hakan Uzan represented to MCC that Telsim would seek financing backed by ECGD, an entity affiliated with the British government that works to promote exports to developing countries by providing insurance, loan guarantees, and other assistance to companies. *See* PT-458 (Edward

Hughes testimony at PI hearing) at 20-21, 25; PI-119 (Memorandum of Understanding ("MOU") of meeting in Chicago on September 3, 1999).

226. This promise induced MCC to enter into the Sixth Amendment to the Equipment Financing Agreement. Indeed, as part of the Sixth Amendment, MCC agreed to make an additional $180 million in equipment financing available to Telsim if Telsim succeeded in obtaining ECGD-backed financing by the end of 1999. *See* PT-458 (Edward Hughes testimony at PI hearing) at 24-25; PI-119 (MOU of meeting in Chicago on September 3, 1999); DX-11 (Sixth Amendment to the Equipment Financing Agreement) at 5.

227. To assist Telsim in its efforts to obtain ECGD-backed financing, MCC engaged Deutsche Bank to undertake a financial review of Telsim and to serve as Telsim's primary lender if the ECGD loan guarantee were approved. *See* PT-458 (Edward Hughes testimony at PI hearing) at 26.

228. For their part, the Uzans promised to "diligently work towards successful completion of ECGD financing." DX-74 (letter dated September 21, 1999 from Edward Hughes to Hakan Uzan); *see also* PI-119 (MOU of meeting in Chicago on September 3, 1999). This, however, was simply a ruse, for the Uzans had no intention of letting Deutsche Bank or anyone else undertake a meaningful financial review of Telsim, which would have revealed the Uzans' diversions of funds and lootings that were already ongoing.

229. Specifically, when the representatives from Deutsche Bank (who had been retained by MCC to assist Telsim in obtaining ECGD-backed financing) visited Telsim's offices to review Telsim's financial records, a Telsim employee, per what appears to have been a prearranged plan, accused a Deutsche Bank analyst of taking a Telsim financial document without permission. That evening,

Hakan Uzan interrupted a dinner meeting between Walter Keating, Edward Hughes, and representatives from Deutsche Bank, brandishing sworn statements of Telsim employees that allegedly documented this episode. Hakan Uzan then announced that he would not provide Deutsche Banke with further access to Telsim's offices. *See* PT-458 (Edward Hughes testimony at PI hearing) at 26-27.

230. By refusing, on a pretext, to provide Deutsche Bank with access to Telsim's offices, and thereby restricting Deutsche Bank's access to Telsim's financial records, Hakan Uzan, as he intended, effectively killed any ECGD-backed Deutsche Bank financing deal. *See* PT-458 (Edward Hughes testimony at PI hearing) at 26; PT-234 (facsimile dated January 13, 2000 from James Pumphrey to Martin Crane).

Sale of Telsim

231. Beginning in late October 1999, defendants further induced MCC into lending additional funds to Telsim by falsely claiming that they were undertaking substantial efforts to sell Telsim and that an advantageous sale of Telsim was imminent.

232. On October 22, 1999, Luna sent an email to Walter Keating of MCC in which he referenced the sale of Orange Plc to Mannesmann and then stated, "Telsim will offer the biggest return in value yet." PI-72 (email dated October 22, 1999 from Luna to Walter Keating); *see also* PT-436 (Responses to MCC Requests to Admit) at Response No. 94.

233. Then at meetings held from October 31, 1999 through November 1, 1999 in Paris, France and London, England, Hakan Uzan told both Hughes and Keating that Telsim had received an unsolicited offer from France Telecom to purchase the company for several billion dollars. *See* PT-458 (Edward Hughes testimony at PI hearing) at

27, 30; PT-474 (Hughes Decl.) ¶ 5. This representation was false, as France Telecom had not in fact made this offer.

234. At this meeting, Hakan Uzan also stated that he and Cem Uzan had convinced their father to consent to the sale of Telsim in its entirety by promising him $1.2 billion from the sale proceeds as compensation for his role in securing the $300 million loan from UBS. *See* PT-458 (Edward Hughes testimony at PI hearing) at 27; PT-165 (letter dated May 4, 1998 from Hakan Uzan to Thomas Brunner); PT-166 (memorandum dated April 24, 1998 from Thomas Brunner regarding Telsim account); PT-167 (Rumeli Cimento Guarantee and Pledge Agreement).

235. Then, at a meeting on November 29, 1999 in Istanbul, Turkey, Hakan Uzan told MCC representatives that he was willing to sell at least a 40% stake in Telsim, and perhaps a greater portion at a premium, but that he needed an additional $450 million in financing from MCC to make Telsim a more attractive acquisition target. Hakan Uzan falsely represented to MCC that Telsim would use the additional financing provided by MCC to expand and improve Telsim's coverage areas and to increase Telsim's subscriber base. *See* PT-458 (Edward Hughes testimony at PI hearing) at 33; PT-436 (Responses to MCC Requests to Admit) at Responses No. 99, 100. Hakan Uzan failed to disclose that this was just a ploy to obtain further monies from MCC that the Uzans could divert to their own non-Telsim purposes.

236. In reliance on Hakan Uzan's false representations, MCC representatives met on December 22-23, 1999, with Hakan Uzan, Cem Uzan, Fatih Azami and Luna to negotiate the terms of what would become the Seventh Amendment to the Equipment Financing Agreement. *See* DX-86 (MOU of meeting in Chicago on December 22 and 23, 1999).

237. Throughout these discussions defendants continued to represent that they would sell an interest in Telsim, whereas they had no intention of so doing. *See* PT-458 (Edward Hughes testimony at PI hearing) at 45. Part of their motive in so representing was to lull MCC, which was increasingly concerned by Telsim's failure to pay its loans on time, into a false sense of security. Thus, for example, Hakan Uzan told Edward Hughes that MCC would be repaid when the company was sold. *See* PT-458 (Edward Hughes testimony at PI hearing) at 74-78.

238. On February 1, 2000, in reliance on defendants' false representation that they had in fact received an offer to purchase Telsim and on defendants' fraudulent promises that they would either sell an interest in or otherwise secure additional financing for Telsim, MCC entered into the Seventh Amendment to the Equipment Financing Agreement, which provided an additional $450 million in financing to Telsim. *See* PT-458 (Edward Hughes testimony at PI hearing) at 35-36; DX-12 (Seventh Amendment to Equipment Financing Agreement).

239. Telsim also agreed that it would repay any amounts of the additional $450 million drawn by Telsim under the Seventh Amendment upon the earlier of the sale of Telsim or September 15, 2000. *See id.* § 2.1.4; DX-86 (MOU of meeting in Chicago on December 22 and 23, 1999).

240. On March 9, 2000, Hakan Uzan sent an email to Hughes and Keating, which stated in relevant part:

> As of today we have two offers . . . . The lowest of the offers was set at 12 Billion USD for the [e]valuation of Telsim and asked for a 51% stake[.] The second offer was slightly higher than this at 14 Billion and also a minimum of %51 [sic][.]

PI-75 (email dated March 9, 2000 from Hakan Uzan to Edward Hughes and Walter Keating); *see also* PT-436 (Responses to MCC Requests to Admit) at Response Nos.

104, 105. This email was false in that, while two tentative offers had been received, one, from Deutsch Telecom, valued Telsim at $9 billion, while the other, from Mannesmann, valued Telsim at $5 billion. *See* PT-39 (letter dated March 8, 2000 from Deutsche Telekom to Merrill Lynch); PT-444 (Sean Carney Deposition) at 38-39; PT-40 (Mannesmann letter dated March 8, 2000).

241. On July 28, 2000, Hakan Uzan sent an email to Hughes falsely claiming that a company called Telefonica was also interested, along with Mannesmann, in purchasing Telsim. *See* PT-32 (email dated July 28, 2000 from Hakan Uzan to Edward Hughes). In actuality, Telefonica never expressed interest in purchasing Telsim, and Telsim had already cut off negotiations with Mannesmann months earlier when Mannesmann had requested detailed financial information about Telsim. *See* PT-40 (Mannesmann offer letter dated March 8, 2000); PT-54 (letter dated March 16, 2000 from Mannesmann to Merrill Lynch); PT-55 (letter dated March 31, 2000 from Mannesmann to Merrill Lynch); *see also* PT-445 (Paul Raphael Deposition) at 101, 107.

242. In similar fashion, the Uzans also refused to provide Deutsche Telecom with requested financial information on Telsim, thus causing the negotiations to abort. *See* PT-444 (Sean Carney Deposition) at 54-78; PT-445 (Paul Raphael Deposition) at 124-27.

243. Yet even while undercutting the purported sale negotiations, Hakan Uzan continued to use the possibility of such a sale as a basis for requesting more money from MCC. Thus, he emailed Hughes on July 28, 2000 that Telsim has "urgent additional financing needs, in cash, . . . terminal financing, . . . and hardware . . . ," needs that had to be satisfied if Telsim were to remain an attractive acquisition for potential purchasers. *See* PT-32 (email dated July 28, 2000 from Hakan Uzan to Edward Hughes).

244. Similarly, on August 30, 2000, Hakan Uzan sent an email to Keating and Hughes, falsely claiming that defendants were still planning on completing the sale of Telsim to a strategic partner, *see* PI-81 (email dated August 30, 2000 from Hakan Uzan to Walter Keating), while all negotiations had essentially ceased.

245. Around the same time, falsely claiming that a sale was imminent, although no buyer had yet been identified, Telsim requested from MCC an additional $700 million in financing for Telsim. *See* PT-458 (Edward Hughes testimony at PI hearing) at 48.

246. On September 25, 2000, Motorola and MCC executives Merle Gilmore, Michael Leahy, and Edward Hughes met with Hakan Uzan in Istanbul, Turkey. *See* PT-436 (Responses to MCC Requests to Admit) at Response No. 109; PT-458 (Edward Hughes testimony at PI hearing) at 48-49. At this meeting, Hakan Uzan requested additional financing from MCC, promising that any additional funds would be used to grow and improve Telsim's business and to make Telsim a more attractive acquisition target. Hakan Uzan committed to doing everything in his power to either sell Telsim or to raise capital from alternative sources so that MCC would be repaid. *See* PT-436 (Responses to MCC Requests to Admit) at Response Nos. 109, 110; PT-458 (Edward Hughes testimony at PI hearing) at 48-49. These representations were false in that, among other things, the Uzans had already undercut or terminated all serious negotiation for sale of Telsim, had no intention of selling Telsim, and intended to continue diverting substantial portions of any monies received from MCC to non-Telsim purposes.

247. In reliance on defendants' fraudulent representations, MCC, on September 29, 2000, entered into the Eighth Amendment to the Equipment Financing Agreement, lending Telsim an additional $700 million as a bridge loan to be repaid in seven months or upon an earlier sale of

Telsim. *See* DX-16 (September 2000 Amendment to Share Pledge Agreement); PT-436 (Responses to MCC Requests to Admit) at Response No. 110. That agreement expressly reconfirmed, in effect, defendants' fraudulent representations by reciting, in § 5 of the Eighth Amendment, that:

> In order to better ensure that [Telsim] will have sufficient funds available to pay all indebtedness owed by [Telsim] to [MCC] on or prior to April 30, 2001, [Telsim] hereby agrees to make aggressive efforts to pursue all potential third-party sources of such funds, including, without limitation, placement of equity and high-yield debt of [Telsim].

DX-13 (Eighth Amendment to Equipment Financing Agreement) § 5.

248. In actuality, however, defendants had no real prospects for obtaining any additional financing, and no intention of pursuing such efforts, since it would have required them to provide financial information that would have exposed their diversions. *See* PT-36 (Telsim Information Memorandum dated October 2000); PT-445 (Paul Raphael Deposition) at 128.

249. Moreover, so as to conceal their true intentions with respect to selling Telsim, defendants excluded MCC from the sales process. While MCC frequently requested updates on the sales effort, *see, e.g.*, PT-31 (email dated August 30, 2000 from Walter Keating to Fatih Azami); PI-82 (email dated October 3, 2000 from Walter Keating to Hakan Uzan); PT-458 (Edward Hughes testimony at PI hearing) at 80, defendants repeatedly denied MCC access to such information. *See* PT-458 (Fatih Azami testimony at PI hearing) at 917-918; PT-458 (Edward Hughes testimony at PI hearing) at 70-71, 88-89; PT-445 (Paul Raphael Deposition) at 142.

High Yield Debt Offering

250. Finally, as an alternative to selling Telsim, the Uzans also fraudulently represented that they were pursuing financing through the issuance of high yield debt securities.

251. For example, on August 23, 2000, Hakan Uzan sent an email to Hughes and Keating, on which he copied Cem Uzan and Luna, stating in an attachment:

> The works [sic] on a Private Placement as well as a high yield financing have commenced, and are viable options. They are there to serve as a fall back plan to the Motorola debt refinancing should a strategic sale not occur within another 4 months (by end November).

PI-79 (attachment to email dated August 23, 2000 from Hakan Uzan to Edward Hughes and Walter Keating) at 3.

252. In actuality, however, by the time the above email was sent, the bank advising Telsim as to such a financing had given up because, as elsewhere, the Uzans refused to let Telsim provide adequate financial data.

253. Specifically, sometime prior to May 26, 2000, Chase learned that Telsim's financials did not comply with U.S. GAAP standards and that Deloitte & Touche, Telsim's auditors, would be giving Telsim a qualified opinion. *See* PT-109 (briefing document dated May 26, 2000).

254. On June 13, 2000, representatives from Chase sent a facsimile to Sema Sanigok of Telsim indicating the need for financial information to remove the qualification from Telsim's audited financial statements. Chase attached to the email the offering of a company that was "in a similar stage of financial and business development as Telsim" and suggested that Telsim might be able to use a similar accounting method to achieve an audit report "with no qualifications" and that the parties arrange a call with Deloitte & Touche to discuss possible accounting treat-

ments. Chase never received a meaningful response to this message. *See* PT-113 (letter dated June 13, 2000 from Chase to Sema Sanigok); PT-443 (Nikola Sutherland Deposition) at 113.

255. In June 2000, Chase performed its "due diligence" on Telsim. Its experience was identical to that of ECGD and Deutsche Telekom, in that Telsim refused to provide Chase with essential financial information necessary to complete the offering. Chase sent various emails to Telsim representatives in an attempt to access further information for the offering, but was unsuccessful. *See* PT-111 (email dated May 6, 2000 from Alain Stalker to Nikola Sutherland and others); PT-112 (memo dated June 9, 2000 regarding outstanding due diligence); PT-443 (Nikola Sutherland Deposition) at 19-21, 91-93, 109-111.

256. By July 2000, Chase had become concerned that the lack of information from defendants was jeopardizing the transaction. *See* PT-443 (Nikola Sutherland Deposition) at 113-114. Accordingly, Chase requested a meeting with defendants. At the meeting, held on July 24, 2000, Hakan Uzan, contradicting his contemporaneous statements to MCC, informed Chase that he was no longer pursuing efforts to obtain a strategic partner through the infusion of new equity. *See* PT-443 (Nikola Sutherland Deposition) at 136-137.

257. On July 28, 2000, Chase wrote to Hakan Uzan, suggesting that Chase might be able to set up a debt offering without the injection of additional equity, but only if Telsim could provide more information about its debt and a "clean" opinion from its accountants. *See* PT-443 (Nikola Sutherland Deposition) at 136, 138-139; PT-117 (letter dated July 28, 2000 from Chase to Hakan Uzan).

258. On August 3, 2002, Hakan Uzan responded with an "irritated and annoyed and dismissive" email, accusing Chase of trying to take over the role of strategic advisor

and stating that at no point had "Telsim made any commitment to undertaking the strategic sale." PT-443 (Nikola Sutherland Deposition) at 142. Thereafter, Chase ceased work on the high yield offering. *See id.* at 142-145.

259. Defendants' false representation as to the viability of and commitment to obtaining a high yield debt offering helped induce MCC into entering into the Eighth Amendment to the Equipment Financing Agreement on September 29, 2000. Indeed, § 5 of the Eighth Amendment provides:

> In order to better ensure that [Telsim] will have sufficient funds available to pay all indebtedness owed by [Telsim] to [MCC] on or prior to April 30, 2001, [Telsim] hereby agrees to make aggressive efforts to pursue all potential third-party sources of such funds, including, without limitation, placement of equity and high-yield debt of [Telsim].

DX-13 (Eighth Amendment to Equipment Financing Agreement) § 5.

Misrepresentations Regarding the Collateral

260. Even before the fraudulent dilution of the collateral, discussed *infra*, defendants materially misled plaintiffs as to the value and security of the pledged shares, as well as to the intentions of the Uzans not to relinquish control of either Telsim or its shares.

261. During early negotiations with defendants, MCC informed Hakan Uzan, Luna, and others that a pledge of Telsim shares as collateral was an absolute prerequisite to MCC's agreeing to provide financing and equipment to Telsim, and that without such a pledge, MCC would walk away from the negotiations. *See* PT-458 (Edward Hughes testimony at PI hearing) at 13-14.

262. MCC also insisted that the Uzans provide proof that the Turkish government would honor any share pledge

agreement entered into and that the share pledge would be enforceable. *See* PT-458 (Edward Hughes testimony at PI hearing) at 17. Responding to this request, the Uzans provided MCC with a letter from Turkey's Ministry of Communications and Transport, dated April 22, 1998, stating that the pledge of Telsim stock to MCC did not violate any regulations under the Ministry's jurisdiction as long as the pledge did not affect the communications service provided by Telsim, as well as a letter from Turkey's Ministry of State, dated April 22, 1998, confirming that a pledge of a majority of Telsim's stock to MCC was consistent with Turkish law even if it ultimately resulted in a share transfer. *See* PT-458 (Edward Hughes testimony at PI hearing) at 17; PI-57 (letter dated April 22, 1998 from Ministry of Communications and Transport); PI-58 (letter dated April 22, 1998 from Ministry of State).

263. Accordingly, on April 24, 1998, MCC and the Uzan-controlled entity that then held approximately two-thirds of Telsim's shares, Rumeli Telefon, entered into the Share Pledge Agreement, pursuant to which Rumeli Telefon pledged 51% of Telsim's shares to MCC. *See* DX-14 (Share Pledge Agreement) at 2; PT-458 (Edward Hughes testimony at PI hearing) at 13-14.

264. Subsequently, in a letter agreement dated August 19, 1998 from Rumeli Telefon to MCC, Hakan Uzan promised not to reduce the shares pledged to MCC under the Share Pledge Agreement until permitted to do so under the Equipment Financing Agreement, the License Financing Agreement, and the Share Pledge Agreement, and until the Kar-Tel loan guaranteed by Telsim had been repaid. *See* PI-60 (letter dated August 19, 1998 from Hakan Uzan to MCC). The board of directors of Rumeli Telefon, including Akay, also executed a resolution specifically authorizing Hakan Uzan to make this covenant with MCC. *See* PI-27 (Rumeli Telefon board of directors resolution dated April 20, 1998).

265. Then on February 24, 1999, in an effort to further mislead MCC as to the security of its collateral, Hakan Uzan sent an email to several MCC and Motorola, Inc. employees in the United States, copying Cem Uzan and Luna, falsely stating:

> There is no financial exposure on MCC and or Motorola [Inc.], the share pledge you are holding for 51% of this company, has recently received a written offer from a major European Operator (for 35% of the company) that would value the total company at over 3.5 billion USD. Lets not kid our selves by thinking that there is a financial exposure on your part.

PI-64 (email dated February 24, 1999 from Hakan Uzan to Edward Hughes and others) at 395.

266. In conjunction with execution of the Seventh Amendment to the Equipment Financing Agreement on February 1, 2000, which by itself increased MCC's loan commitment by $450 million, the Share Pledge Agreement was amended to increase the percentage of Telsim's outstanding shares pledged to MCC from 51% to 66%. *See* DX-15 (February 1, 2000 Amendment to Share Pledge Agreement) § 5. At the same time, both the Share Pledge Agreement and Pledgeholder Agreement were amended to eliminate any requirement that MCC had to arbitrate prior to foreclosing on the pledged shares. *See* DX-19 (February 1, 2000 Amendment to Pledgeholder Agreement) at 3; PT-458 (Edward Hughes testimony at PI hearing) at 167.

267. After this amendment was executed, defendants continued to mislead MCC as to the value and security of the pledged shares. For example, on March 9, 2000, Hakan Uzan sent an email message to Hughes and Keating in Illinois, describing various purported third-party offers to buy Telsim and stating:

> So you can tell all the guys with shaky hands and who were worried, . . . well just tell them not to worry any

> more, according to the written offers you are presently holding as share pledge a value greater than 7.8 billion USD for a debt of 1.4 billion USD.

PI-75 (email dated March 9, 2000 from Hakan Uzan to Edward Hughes and Walter Keating). This message placed the value of Telsim at approximately $11.8 billion, a figure that, as previously noted, was far in excess of the valuation made in any written offers to purchase Telsim. But the false statement, like others, was designed to lull plaintiffs into a false sense of security.

268. The pledged collateral was vital to MCC not only for the financial protection it purported to provide but also for the potential control of Telsim that it seemingly provided if foreclosure occurred. Thus, for example, when MCC entered into the Eighth Amendment to the Equipment Financing Agreement, the Share Pledge Agreement was also amended to further enhance MCC's control over the pledged shares. *See* DX-16 (September 2000 Amendment to the Share Pledge Agreement). At no time, however, did defendants reveal their true intent, which was never to part with control of Telsim under any circumstances.

The Events Preceding Default

269. At a meeting on January 9, 2001, Hakan Uzan unintentionally provided a hint of the Uzans' fraudulent ways by boasting to Hughes, Keating, and others that he had been able to obtain a twelve-month extension on amounts owed under a contract with the Turkish Football League by arguing that a recent earthquake was a "*force majeure*" event. Hakan Uzan admitted that he had not intended to pay the Turkish Football League the amounts he owed, regardless of the earthquake, and that when the twelve-month extension was up, he also probably would not make payments. *See* PT-458 (Edward Hughes testimony at

PI hearing) at 62. The Court finds that defendants' recent reliance on "economic *force majeure*" for non-payment is a similarly fraudulent mechanism, designed to obscure defendants' true intent.

270. After numerous extensions on repayment of its loans from MCC, Telsim was finally given a "final" repayment deadline of April, 2001 on $700 million of the loan. But as the deadline approached, the Uzans again began to try to buy more time with false representations. On February 15, 2001, Hakan Uzan sent an email to Hughes, falsely stating that a recent meeting with Vodaphone was very positive and that two serious candidates were interested in the sale. *See* PI-85 (email dated February 15, 2001 from Hakan Uzan to Edward Hughes). Three days later, on February 18, 2001, Hakan Uzan sent an email to Keith Bane of Motorola, Inc. again falsely claiming that two buyers were still interested in Telsim. The email concluded: "So although the April deadline might look to be difficult, we are confident that our desire to execute a strategic transaction will result in success for Telsim within a reasonable period of time." PI-86 (email dated February 18, 2001 from Hakan Uzan to Keith Bane).

271. In March 2001, MCC retained Goldman Sachs to make an independent valuation of Telsim. Defendants, however, denied Goldman Sachs access to Telsim's financial information for any purpose. *See* PT-237 (email dated March 7, 2001 from Keith Bane to Hakan Uzan); PT-25 (letter dated March 26, 2001 from Hakan Uzan to Keith Bane); PT-458 (Fatih Azami testimony at PI hearing) at 921; PT-458 (Edward Hughes testimony at PI hearing) at 80; PI-91 (email dated April 20, 2001 from Hakan Uzan to Keith Bane).

272. In a letter dated March 26, 2001, Hakan Uzan again claimed that he was engaged in serious efforts to sell Telsim and that Orange Plc, and Vodaphone were interested in

pursuing a deal. *See* PT-25 (letter dated March 26, 2001 from Hakan Uzan to Keith Bane). Again, these representations were false. *See* PT-444 (Sean Carney Deposition) at 77-80 (as to Vodaphone, "there may have been some preliminary discussions which didn't go anywhere," and as to France Telecom and Orange, there may have been a meeting or just phone calls, "but within four to six weeks the trail had run cold again"); PT-445 (Paul Raphael Deposition) at 127-28 (after September 2000, "I recall there were a couple of conversations, but they were just conversations.").

273. By mid-March, it became clear that defendants had no intention of repaying the $700 million due in April 2001. MCC, therefore, by letter dated March 19, 2001, attempted to negotiate a rescheduling of Telsim's debt. *See* PT-16 (letter dated March 19, 2001 from Keating to Telsim). However, by letter dated March 20, 2001, defendants rejected MCC's rescheduling proposal, falsely representing that "the discussions of a potential strategic partner joining Telsim [were] in progress and underway," including a "possible contact with France Telecom/Orange." PT-235 (letter dated March 20, 2001 from Hakan Uzan to Keith Bane); *see also* PT-236 (letter dated March 22, 2001 from Keith Bane to Hakan Uzan).

274. On May 22, 2001, MCC issued its Notice of Default based on defendants' failure to make the $700 million payment at the end of April. The letter noted that MCC had no alternatives given defendants' refusal to respond to the rescheduling proposal and to perform other obligations under the agreement, such as provide accurate financial statements. *See* DX-130 (letter dated May 22, 2001 from MCC to Hakan Uzan) at 2.

The Fraud on Nokia

275. As part of their overall scheme to use Telsim as a front for fraudulently obtaining monies for non-Telsim uses, defendants induced Nokia to extend loans to Telsim on the basis of very similar misrepresentations to those practiced on MCC, a parallelism that is further proof of defendants' fraudulent intent. *See generally* PT-458 (Ernst Kramer testimony at PI hearing) at 465-473; PT-1193 (Kramer Decl. dated January 28, 2002) ¶ 3.

276. Prior to negotiating and entering into -the agreements that form the basis of Nokia's claims, Telsim entered into an agreement in 1997, much smaller in scope, to purchase radio equipment and services from Nokia. *See* PT-1002F (Supply Contract dated September 15, 1997); PT-458 (Ernst Kramer testimony at PI hearing) at 413-414; PT-1192 (Responses to Nokia Requests to Admit) at Response No. 1. Under this arrangement, Telsim paid for its purchases, in part, with a series of promissory notes. *See e.g.*, PT-1180 (promissory note for $7,459 dated April 3, 1999). The debt under the promissory notes grew to approximately $5 million. *See* Answer ¶ 77. In large part, Telsim paid these promissory notes in a timely fashion. Thus, the Uzans established a positive track record to make Nokia feel comfortable entering into the much larger arrangements that followed and that are now the subject of this litigation. *See* PT-1193 (Kramer Decl. dated January 28, 2002) ¶ 4.

277. Eventually, the parties entered into an agreement whereby Telsim purchased a Network Switching Subsystem ("NSS") and related products and services from Nokia. As part of the agreement, Nokia agreed to provide financing, and, to that end, arranged for the Stockholm branch of ABN-AMRO Bank to provide Telsim with a loan facility, fully backed by Nokia, to finance Telsim's purchases from Nokia. *See* PT-458 (Ernst Kramer testimony at PI hearing) at 414. By May 2000, Nokia had

caused the amount of the loan facility to increase to $800 million. *See* PT-1193 (Kramer Decl. dated January 28, 2002) ¶ 5.

278. Throughout the negotiations leading up to each version of the operative agreements, Nokia made clear to Hakan Uzan, Cem Uzan, and Fatih Azami that there were two non-negotiable prerequisites to Nokia's providing financing to Telsim: (1) defendants' commitment to sell all or a controlling portion of Telsim to a strategic partner within a reasonable amount of time; and (2) defendants' promise to provide Nokia with sufficient security for the financing. Each of these requirements was eventually reduced to writing. *See* PT-458 (Ernst Kramer testimony at PI hearing) at 414-419, 436-437, 443-444; PT-1193 (Kramer Decl. dated January 28, 2002) ¶ 6.

279. In the negotiations between Nokia and Telsim concerning the parties' agreements and subsequent amendments, Hakan Uzan served as Telsim's principal negotiator. Cem Uzan was physically present at one negotiation session in May 2000, and Hakan Uzan made frequent and lengthy telephone calls to Cem Uzan to discuss substantive issues that arose during the negotiations, with Cem Uzan providing input that significantly influenced Hakan Uzan. *See* PT-458 (Ernst Kramer testimony at PI hearing) at 419, 421-423; PT-1193 (Kramer Decl. dated January 28, 2002) ¶ 7; *see also* Answer ¶¶ 80, 115.

280. Although Kemal Uzan was not present during the negotiations, it was clear that his approval was necessary for Telsim to enter into the agreements. *See* PI-74 (email dated March 6, 2000 from Hakan Uzan to Murat Kircuval); PT-458 (Ernst Kramer testimony at PI hearing) at 422-423; PT-1193 (Kramer Decl. dated January 28, 2002) ¶ 7. Additionally, Aysegul Akay attended critical Telsim Board of Directors meetings relating to these transactions. *See*

PT-216 (Telsim Board of Directors decision dated April 24, 2001); PT-1193 (Kramer Decl. dated January 28, 2002) ¶ 7.

The First Facility Agreement

281. In approximately 1997, prior to entering into the agreements at issue, Nokia and Telsim began exchanging information and discussing the possibility of Nokia supplying Telsim with switching technology. *See* PT-1192 (Responses to Nokia Requests to Admit) at Response No. 2. As a result, Nokia and Telsim signed a MOU dated May 1, 1997 concerning the supply by Nokia of a NSS to Telsim, and a later MOU dated June 18, 1998 concerning the supply by Nokia of products and services related to the NSS. *See* PT-1001 (MOU dated June 18, 1998); PT-1193 (Kramer Decl. dated January 28, 2002) ¶ 9; *see also* Answer ¶ 82.

282. As a result of these preliminary agreements, on October 9, 1998, Nokia and Telsim entered into the NSS Frame Contract for the Supply of Products and Related Services for a Network Switching Sub-system (the "Supply Contract"). *See* PT-1006A. Defendant Hakan Uzan signed this agreement on behalf of Telsim. *See* PT-1192 (Responses to Nokia Requests to Admit) at Response No. 5. The Supply Contract required Nokia to arrange financing through an international bank to fund Telsim's purchases of Nokia's products and services. *See* PT-1006A (Supply Contract) ¶ 5.51; PT-458 (Ernst Kramer testimony at PI hearing) at 414-416; PT-1193 (Kramer Decl. dated January 28, 2002) ¶ 11. Nowhere, however, was it disclosed that the Uzans intended to divert substantial portions of the proceeds of this financing to their own, non-Telsim purposes.

283. Nokia eventually engaged ABN-AMRO Bank to establish the loan facility (the "Nokia Financing") to Telsim, which was backed by Nokia. *See* PT-1006A (Supply Contract) ¶ 5.5.1; PT-458 (Ernst Kramer testimony at PI

hearing) at 414-416, 440-441; PT-1193 (Kramer Decl. dated January 28, 2002) ¶ 12; *see also* Answer ¶ 85; PT-1192 (Responses to Nokia Requests to Admit) at Response No. 7. Defendants were aware that the Nokia Financing through ABN-AMRO Bank was backed by Nokia. *See* PT-1193 (Kramer Decl. dated January 28, 2002) ¶ 12. On or about June 24, 1999, Telsim and ABN-AMRO Bank, on behalf of Nokia, entered into two related agreements providing for a total loan facility in the amount of $78,059,698 (collectively the "First Facility Agreement"). *See* PT-1002A-G; PT-458 (Ernst Kramer testimony at PI hearing) at 415-16. Hakan Uzan and Fatih Azami signed these agreements on behalf of Telsim. *See* PT-1002A (First Facility Agreement), 1002E (First Facility Agreement); PT-1192 (Responses to Nokia Requests to Admit) at Response No. 9; PT-458 (Ernst Kramer testimony at PI hearing) at 808.

284. The express purpose of the First Facility Agreement was to finance Telsim's purchase of products and services from Nokia under the Supply Contract. *See* PT-1002A (First Facility Agreement) § 2.2; 1002E (First Facility Agreement) § 2.2; PT-458 (Ernst Kramer testimony at PI hearing) at 413-416; PT-1193 (Kramer Decl. dated January 28, 2002) ¶ 13. Nowhere did the First Facility Agreement disclose the Uzans' intent to divert proceeds to non-Telsim purposes.

285. By a separate Amendment Agreement dated June 24, 1999, executed by ABN-AMRO Bank and Telsim, and agreed to and acknowledged by Nokia, Telsim agreed to provide ABN-AMRO Bank, on behalf of Nokia, with a pledge of 20% of Telsim's stock. *See* PT-1002D (Amendment Agreement); PT-458 (Ernst Kramer testimony at PI hearing) at 417-419; PT-1193 (Kramer Decl. dated January 28, 2002) ¶ 13; PT-458 (Fatih Azami testimony at PI hearing) at 810; PT-1192 (Responses to Nokia Requests to Admit) at Response No. 12; *see also* PT-1101 (email dated Feb. 17, 1999 from Fatih Azami to Mikko Routti). To

further effectuate this pledge, on October 1, 1999, Rumeli Telefon and ABN-AMRO Bank, on behalf of Nokia, entered into a Share Pledge Agreement (PT-1002A). *See* PT-1193 (Kramer Decl. dated January 28, 2002) ¶ 14; PT-1192 (Responses to Nokia Requests to Admit) at Response No. 14, pursuant to which Rumeli Telefon, which at the time owned approximately 73% of Telsim's shares, pledged, on a secondary-ranking basis (behind MCC's first-ranking pledge), 20% of Rumeli Telefon's interest in Telsim to ABN-AMRO Bank. *See* PT-1002A (Share Pledge Agreement); PT-1193 (Kramer Decl. dated January 28, 2002) ¶ 14; PT-1192 (Responses to Nokia Requests to Admit) at Response No. 15.

286. Defendant Hakan Uzan signed this agreement on behalf of Rumeli Telefon. *See* PT-1002A (Share Pledge Agreement); PT-1193 (Kramer Decl. dated January 28, 2002) ¶ 14; PT-1192 (Responses to Nokia Requests to Admit) at Response No. 16. He at no time disclosed his already-formed intent not to honor the pledge.

The Second Facility Agreement

287. Beginning in or about January 2000, Hakan Uzan approached Nokia about restructuring their financial relationship. Hakan Uzan indicated that he needed Nokia to provide additional equipment financing (up to a total of $300 million), cash financing of $75 million in order to boost subscriber levels, and an extension of the parties' supply contract. *See* PT-1120 (email dated January 14, 2000 from Suha Akyol to Murat Kircuval); PT-1141 (email dated February 7, 2000 from Ernst Kramer to Sema Sanigok); PT-458 (Ernst Kramer testimony at PI hearing) at 431-32; *see also* PT-1192 (Responses to Nokia Requests to Admit) at Response Nos. 19, 20, 29; Answer ¶ 88.

288. Hakan Uzan also stated that Telsim was already in negotiations with potential strategic partners or investors,

and that they intended to and would have an agreement with a strategic partner or investor by the summer of 2000. *See* PT-458 (Ernst Kramer testimony at PI hearing) at 432-434; *see also* PT-1192 (Responses to Nokia Requests to Admit) at Response Nos. 24, 28. In actuality, the Uzans had no intention of entering into such arrangements, since to do so would have required them to disclose financial information that would have revealed their fraudulent diversions.

289. In addition, beginning in early March 2000 Hakan Uzan informed Nokia that if Nokia was not able to restructure their agreements immediately, Telsim would thereafter purchase their switching equipment from rival Siemens, A.G. ("Siemens"). For example, on March 3, 2000, Hakan Uzan sent an email to Murat Kircuval of Nokia in which he wrote:

> Please believe me that I want to wrap up this issue with Nokia despite the technical capacity of Siemens .... Believe me, and tell this to your friends, it is important to me that Nokia stays. Have them approve of this matter (the cash amount issue). I will personally come on Thursday and finalize this, and will do anything to prevent Siemens from coming in.

PI-73 (email dated March 3, 2000 from Hakan Uzan to Murat Kircuval); *see also* PT-458 (Ernst Kramer testimony at PI hearing) at 437-438; PT-1193 (Kramer Decl. dated January 28, 2002) ¶ 19; PT-1192 (Responses to Nokia Requests to Admit) at Response No. 34; Answer ¶ 92.

290. On March 6, 2000, Kircuval received another email from Hakan Uzan, stating that Hakan "received instructions from Kemal [Uzan] today .... Siemens is at this point ready. We need to finalize the project with Nokia by Wednesday (8/3), the day the requests will be made by potential investors." PI-74 (email dated March 6, 2000 from Hakan Uzan to Murat Kircuval); *see also* PT-458 (Ernst

Kramer testimony at PI hearing) at 437-438; PT-1193 (Kramer Decl. dated January 28, 2002) ¶ 20; PT-1192 (Responses to Nokia Requests to Admit) at Response No. 35; PT-458 (Fatih Azami testimony at PI hearing) at 818-820; Answer ¶ 93. Hakan Uzan also stated that Siemens had already paid a $25 million cash advance and that if he was required to terminate the arrangement with Siemens, he would need cash to repay that advance. *See* PT-458 (Ernst Kramer testimony at PI hearing) at 437-439; PT-1193 (Kramer Decl. dated January 28, 2002) ¶ 19; PT-1192 (Responses to Nokia Requests to Admit) at Response Nos. 21, 30, 32, 33.

291. In actuality, Siemens had not advanced $25 million to Telsim at this time. But after Nokia, fearing the competition, provided the additional $25 million to Telsim, Telsim went and borrowed an additional $25 million from Siemens anyway, falsely assuring each company that it was Telsim's sole supplier of switching equipment. *See* PI-3 (Declaration of Gunter Breuninger dated April 2, 2002 ("Breuninger Decl.")) ¶ 7; PI-458 (Fatih Azami testimony at PI hearing) at 831.

292. Specifically, the Supply Contract, as amended on March 10, 2000, provided that Nokia would be Telsim's exclusive supplier for a two-year period. *See* PT-1003F (Amendment No. 1 to the Supply Contract) § 1.2; PT-1015 (minutes of May 15, 2002 meeting); PT-458 (Ernst Kramer testimony at PI hearing) at 437, 445-446; PT-1192 (Responses to Nokia Requests to Admit) at Response No. 40; PT-458 (Fatih Azami testimony at PI hearing) at 820-824. But, at the very time this representation was made, the Uzans, who were finalizing the parallel agreement with Siemens, knew it was false. The Uzans, recognizing that Nokia was unlikely to be in contact with arch-rival Siemens (and vice versa), would be unlikely to find out about the fraud and that the Uzans could therefore obtain still more divertible money via Telsim.

293. Under the Second Facility Agreement, which replaced and canceled the First Facility Agreement, the amount of the loan facility, which remained fully backed by Nokia, was increased to $400 million. *See* PT-1003B (Second Facility Agreement); PT-1193 (Kramer Decl. dated January 28, 2002) ¶ 23; PT-1192 (Responses to Nokia Requests to Admit) at Response No. 42. Nowhere did the agreement disclose the Uzans' diversion of funds to non-Telsim uses.

294. At defendants' direction, the wire transfers that carried out the transfer of funds were executed through the Bank of New York. *See* PT-1077 (email dated March 10, 2000 from Ayse Aksel to Yahim Nassen containing wire transfer instructions); PT-458 (Ernst Kramer testimony at PI hearing) at 444-445; PT-1192 (Responses to Nokia Requests to Admit) at Response No. 46.

295. As described above, collateral was a major issue for Nokia during these negotiations. During the parties' meetings, Hakan Uzan told Nokia representatives that by pledging Telsim shares, he would not only provide Nokia with more than adequate security, he would be pledging to them the "heart and soul" of his family, and something very "precious" to him and his family. He also stressed how difficult it was to obtain the approval of his father, defendant Kemal Uzan, for the pledge. PT-458 (Ernst Kramer testimony at PI hearing) at 436-437; *see also* PT-1193 (Kramer Decl. dated January 28, 2002) ¶ 25; Answer ¶ 99.

296. Based on these false assurances, a new Share Pledge Agreement between ABN-AMRO Bank and Uzan-controlled Rumeli Telefon was executed. Rumeli Telefon now pledged, on a first-ranking basis, 5% of the issued and outstanding shares of Telsim to ABN-AMRO Bank as security for the loan facility. Defendant Hakan Uzan signed this agreement on behalf of Rumeli Telefon. Defendant Aysegul Akay signed the Board Resolutions of

Rumeli Telefon authorizing the pledge. *See* PT-1003C (Share Pledge Agreement); PT-1003I (Resolutions of Board of Directors of Rumeli Telefon Nos. 110, 111, and 112); PT-458 (Ernst Kramer testimony at PI hearing) at 434, 436; PT-1193 (Kramer Decl. dated January 28, 2002) ¶ 26; PT-1192 (Responses to Nokia Requests to Admit) at Response No. 49, 50. The Uzans, however, failed to disclose that MCC's pledged shares had now increased to 66%, so that virtually the entirety of Rumeli Telefon's shares was being pledged. On the contrary, Hakan Uzan and Fatih Azami represented to Nokia that Telsim's debt to MCC had not increased from the amount owed when the Phase I Agreements were signed, exclusive of interest. *See* PT-458 (Ernst Kramer testimony at PI hearing) at 435-436; PT-458 (Fatih Azami testimony at PI hearing) at 813.

297. Nokia would not have provided the whole financing included in the Phase II Agreements if they had been informed that MCC financing to Telsim had increased between June 1999 and March 2000. *See* PT-1090 (letter dated February 4, 1999 from Mikko Routti to Fatih Azami); PT-1106 (email dated May 14, 1999 from Mikko Routti to Sema Sanigok and others); PT-1099 (letter dated July 9, 1999 from Mikko Routti to Fatih Azami); PT-1098 (email dated August 4, 1999 from Mikko Routti to Sema Sanigok); PT-1097 (email dated August 26, 1999 from Joacim Nassen to Sema Sanigok); PT-1096 (email dated August 26, 1999 from Fatih Azami to Joacim Nassen); PT-1011 (email dated Nov. 16, 1999 from Ernst Kramer to Hakan Uzan); PT-1016 (email dated Dec. 28, 1999 from Ernst Kramer to Fatih Azami and Sema Sanigok); PT-458 (Ernst Kramer testimony at PI hearing) at 436.

The Third Facility Agreement

298. Within a matter of weeks, in April 2000, the Uzans approached Nokia seeking to increase the loan facility

again, once more raising both the threat of taking their business elsewhere and the likelihood of their finding a strategic partner. Thus, in an email to Murat Kircuval of Nokia dated April 26, 2000, Hakan Uzan stated: "We have received a lot of attractive offers from other parties .... Perhaps we can pay everything off and take back our shares, all depending on the numbers. Our goal is to pay everything off, if nothing unexpected happens. We will see after that what will happen, there are many attractive offers on the table." PI-78 (email dated April 26, 2000 from Hakan Uzan to Murat Kircuval); *see also* PT-458 (Ernst Kramer testimony at PI hearing at 448-450); PT-1193 (Kramer Decl. dated January 28, 2002) ¶ 28; PT-1192 (Responses to Nokia Requests to Admit) at Response No. 56.

299. On or about April 26, 2000, Hakan Uzan stated that Telsim was in the final stages of negotiations with Siemens, and that Nokia could only remain a supplier to Telsim if they could meet Siemens' offer. *See* PT-458 (Ernst Kramer testimony at PI hearing) at 447. Thus, within weeks of signing the Phase II Agreements, defendants were already threatening to breach one of the key aspects of the deal—the exclusivity provision of the Supply Contract. *See* PT-1003F (Amendment No. 1 to Supply Contract) § 1.2; PT-1193 (Kramer Decl. dated January 28, 2002) ¶ 29; PT-458 (Fatih Azami testimony at PI hearing) at 821-824. At the same time, the Uzans failed to disclose during these negotiations that Telsim had already signed a MOU with Siemens on April 5, 2000. *See* DX-458; PI-3 (Breuninger Decl.) ¶ 6; PT-458 (Fatih Azami testimony at PI hearing) at 820. Indeed, as Nokia later learned through the Turkish Customs office, a Siemens switch was delivered to Telsim in Turkey in approximately May 2000. *See* PI-3 (Breuninger Decl.) ¶ 5; PT-1193 (Kramer Decl. dated January 28, 2002) ¶ 29; PT-1192 (Responses to Nokia Requests to Admit) at Response No. 58; *see also* Answer ¶ 103.

300. At the same time, defendants continued to mislead Nokia into believing that they intended to find a strategic partner for Telsim. In this regard, the Uzans also told Nokia that they had engaged Merrill Lynch to help them find a strategic partner, but refused to allow any communication between Nokia and Merrill Lynch. *See* PT-1115 (email dated May 14, 2000 from Hakan Uzan to Ernst Kramer); PT-458 (Ernst Kramer testimony at PI hearing) at 452-454; PT-1193 (Kramer Decl. dated January 28, 2002) ¶ 30; PT-1192 (Responses to Nokia Requests to Admit) at Response Nos. 62, 63; *see also* Answer ¶ 104.

301. On May 22-24, 2000, the parties met in Zurich to negotiate and draft a new series of agreements (the "Phase III Agreements"). *See* PT-458 (Ernst Kramer testimony at PI hearing) at 453; PT-1193 (Kramer Decl. dated January 28, 2002) ¶ 31; PT-1192 (Responses to Nokia Requests to Admit) at Response No. 64; *see also* Answer ¶ 105. Defendant Hakan Uzan, who was actively involved throughout the entire negotiation process, attended the May 23 and May 24 meetings personally, and was joined by his brother Cem Uzan for the May 23 meeting. *See* PT-458 (Ernst Kramer testimony at PI hearing) at 453-454; PT-1193 (Kramer Decl. Jan. 28, 2002) ¶ 31; PT-1192 (Responses to Nokia Requests to Admit) at Response No. 65; *see also* Answer ¶ 105. At these meetings, Hakan Uzan represented that Telsim was in final negotiations with both Deutsche Telekom and Vodafone, and that an agreement for a strategic partner would be concluded by July 1, 2000. *See* PT-458 (Ernst Kramer testimony at PI hearing) at 452; PT-1193 (Kramer Decl. dated January 28, 2002) ¶ 42. As previously noted, these representations were false. But when Nokia requested that Cem Uzan and Hakan Uzan show to Nokia representatives the agreement that Telsim was allegedly drafting with a potential strategic partner or investor, *see* PT-458 (Ernst Kramer testimony at PI hearing) at 453, Cem Uzan responded that Nokia was

making an unethical request. *See* PT-458 (Ernst Kramer testimony at PI hearing) at 453-454.

302. The issue of the strategic partner was discussed on May 24, 2000 by video conference among Hakan Uzan and Faith Azami, and for Nokia by its CFO Olli-Pekka Kallasvuo and Messrs. Mikko Heikkonen and Pertti Melamies. *See* PT-458 (Ernst Kramer testimony at PI hearing) at 454-455. While Hakan Uzan, in the presence of Fatih Azami, refused to include a written commitment to secure a strategic investor as a condition precedent to the new Third Facility Agreement, claiming that he did not wish to disclose such a commitment to interested partners or investors, *see* PT-458 (Fatih Azami testimony at PI hearing) at 840-842, he gave his verbal commitment, memorialized in a Side Letter, and promised that $200 million of the facility would be repaid immediately if by October 1, 2000, no agreement was reached to sell a substantial part of the share capital and voting rights in Telsim to an international foreign telecom-operator that thereby would have become a strategic partner. The Uzans made these representations intending to dishonor them and for the purpose of inducing Nokia to enter into the Phase III Agreements and to increase the loan facility. *See* PT-458 (Ernst Kramer testimony at PI hearing) at 455-457; PT-1193 (Kramer Decl. dated January 28, 2002) ¶ 31; PT-458 (Fatih Azami testimony at PI hearing) at 840-845, 846-848; PT-1192 (Responses to Nokia Requests to Admit) at Response Nos. 69, 70.

303. On May 24, 2000, Hakan Uzan signed the Side Letter, thereby obligating Telsim to obtain a strategic partner or investor by October 1, 2000, on behalf of Telsim. *See* PI-203. At that time, Hakan Uzan knew that he could not fulfill this representation, and did not intend to, since it would have meant disclosing financial information that would have revealed the Uzans' diversions of funds.

304. The Third Facility Agreement increased the amount of the loan facility to $800 million, also in two tranches. Tranche A, which funded the Nokia Financing in the amount of $350 million, was to be used only to pay Nokia for products and services. Tranche B, in the amount of $450 million, provided Telsim with an additional $350 million in cash beyond the $100 million previously transferred under the Second Facility Agreement. Hakan Uzan signed this agreement on behalf of Telsim. *See* PT-1004D (Third Facility Agreement) § 2.2, p. 39; PT-458 (Ernst Kramer testimony at PI hearing) at 458-460; PT-1193 (Kramer Decl. dated January 28, 2002) ¶ 34; PT-1192 (Responses to Nokia Requests to Admit) at Response No. 77, 79.

305. Among other things, defendants insisted on this cash tranche so, they claimed, that they could pay taxes owed to the Turkish government in connection with their GSM license. *See* PT-1193 (Kramer Decl. dated January 28, 2002) ¶ 34. This representation was false.

306. At Hakan Uzan's direction, these wire transfers to Telsim were executed through the Bank of New York. *See* PI-204 (wire transfer order signed by Hakan Uzan); PT-1062 (SWIFT printout notices for wire transfer); PT-1193 (Kramer Decl. dated January 28, 2002) ¶ 35; PT-458 (Ernst Kramer testimony at PI hearing) at 460; PT-1192 (Responses to Nokia Requests to Admit) at Response No. 83.

307. Based on the Uzans' continuing false assurances concerning the adequacy of the share pledge, the Phase III Share Pledge Agreement between ABN-AMRO Bank and Rumeli Telefon increased the amount of the pledge from 5% to 7.5% of the issued and outstanding shares of Telsim to ABN-AMRO Bank. *See* PT-458 (Ernst Kramer testimony at PI hearing) at 460; PT-1193 (Kramer Decl. dated January 28, 2002) ¶ 36. Hakan Uzan signed this agreement on behalf of Rumeli Telefon. *See* PT-1193 (Kramer Decl. dated January 28, 2002) ¶ 36; PT-1004E (Third Facility

Agreement). Defendant Aysegul Akay signed the Board Resolutions of Rumeli Telefon authorizing the pledge. *See* PT-1193 (Kramer Decl. dated January 28, 2002) ¶ 36; PT-1004M (Telsim board resolution). Again, the Uzans failed to disclose their intention never to let control of the collateral pass to Nokia.

Events Leading to Default on the Nokia Loans

308. As described above, the basis of the Third Facility Agreement was defendants' commitment in a Side Letter to secure an international foreign telecommunications operator as a strategic partner by October 1, 2000, or be required immediately to repay ABN-AMRO Bank $200 million. While negotiating this point, Hakan Uzan and Fatih Azami falsely represented that Telsim was so close to a deal that they needed only until July, not October, as provided in the Side Letter, to fulfill their obligations.

309. In approximately August and September 2000, it became apparent to Nokia that the Uzans did not intend to find a purchaser or strategic partner for Telsim. *See* PT-1040 (letter dated September 19, 2000 from Timo Korvenpaa to Fatih Azami). Indeed, by October 1, 2000, they had not succeeded in finding a strategic partner; thus, $200 million became immediately due and payable under the Side Letter. *See* PT-1193 (Kramer Decl. dated January 28, 2002) ¶ 44; PT-458 (Ernst Kramer testimony at PI hearing) at 462.

310. On March 15, 2001, the first payment of approximately $25 million under the Facility Agreements became due. This amount, together with the $200 million owed under the Side Letter, was not paid, and has never been paid. *See* PT-458 (Ernst Kramer testimony at PI hearing) at 463-464. On May 9, 2001, Nokia formally notified Telsim of its default status. *See* DX-126, 127 (notices of default).

311. The parties also exchanged other written correspondence during this time period. Nokia pointed out Telsim's many failures under the agreements, as well as Telsim's refusal to sign the amended agreement negotiated and drafted in January 2001. The Uzans responded with still more false representations in a futile attempt to explain away their many failures under the agreements, raising, among other things, purported performance failures of Nokia and the purported "*force majeure*" effects of changes in the Turkish economy in December 2000 and early 2001 upon Telsim's ability to fulfill any of its financial obligations. The Uzans knew that their purported justifications were false. *See* PI-322A-D (correspondence dated March 15-19, 2001 between Nokia and Hakan Uzan); PT-1041 (email dated April 10, 2001 from Hakan Uzan to Murat Kircuval); PT-1046 (email dated May 29, 2001 from Timo Korvenpaa to Telsim); PT-1051 (letter dated July 9, 2001 Nokia to Telsim); PT-1049 (letter dated July 17, 2001 from ABN-AMRO Bank to Fatih Azami); PT-1121 (letter dated August 1, 2001 from Hakan Uzan to ABN-AMRO Bank); PT-1052 (letter dated September 17, 2001 from Jorma O. Lila to Hakan Uzan); PT-458 (Ernst Kramer testimony at PI hearing) at 463-466; PT-1193 (Kramer Decl. dated January 28, 2002) ¶ 47; *see also* Answer ¶ 123.

The Diversions of Loan Proceeds From Telsim

312. As the foregoing account shows, plaintiffs relied to their detriment on numerous false and fraudulent statements made by the defendants that served to induce plaintiffs to extend both their initial and their subsequent loans to Telsim. These misrepresentations were, without exception, sufficiently material that, had plaintiffs known the truth, plaintiffs would never have extended the loans, let alone done business with the Uzans.

313. It is true that plaintiffs appear to have had some awareness of the frequent allegations of fraud that have been made against the Uzans over the years by Turkish regulatory authorities, *see, e.g.*, report of the Turkish Capital Markets Board ("SPK") accusing the Uzans of fraudulently diverting nearly $12 million from a Uzan-controlled power company into one of their banks, *see* PT-433 (SPK Audit Report), and that continue even now, *see, e.g.*, L. Boulton and C. Daniel, *Bank Watchdog Wants Uzans Charged*, FINANCIAL TIMES, July 26, 2003, 2003 WL 60564182 ("Turkey's banking watchdog is pressing for criminal charges against the controversial Uzan family after claiming to have discovered a system of double-accounting at their failed Imarbank."). But Turkey was a tempting market for cellular communications expansion, and the Uzans lulled the plaintiffs into complacency by making timely payment on small initial transactions by which plaintiffs "tested the waters." Once, moreover, plaintiffs had committed very large sums in reliance on defendants' false representations regarding the transactions here in issue, they were psychologically predisposed to credit defendants' further lies rather than admit that they had been swindled and faced huge losses.

314. The motive for defendants' scheme is not hard to discern: defendants sought to enrich themselves at plaintiffs' expense. More particularly, the Uzans—building a diverse economic empire and constantly confronted with the uncertainties and vicissitudes of the Turkish economy—saw plaintiffs' loans to Telsim as a great opportunity to funnel vast sums into their control and then divert them wherever they chose, whether to prop up other companies in their far-flung enterprise or to simply launder monies into their own pockets.

315. In any event, while defendants' refusal to supply adequate discovery in this case (all the while accepting substantial discovery provided by plaintiffs) has made it

difficult to trace every relevant transaction, the Court agrees with the findings of plaintiffs' expert, Anthony Samuel, that the Uzans siphoned into their own banks or into non-Telsim entities they controlled more than $1 billion of the monies lent to Telsim. The extent and frequency of these diversions, especially when coupled with the overwhelming evidence of defendants' fraudulent intent, lead inexorably to the further conclusion that defendants intended such diversion of funds from the outset of the transactions here at issue.

316. Of the more than $1 billion that was fraudulently diverted from Telsim, $450 million was siphoned directly to other Uzan entities in Turkey, and another $133 million was diverted to Uzan-controlled offshore entities on the island of Curacao in The Netherland Antilles, named Brampton, Novabrands, Kingsbury, and Klavma (collectively referred to as "offshore entities"). Finally, at least $552 million was laundered into the control of Uzan-controlled companies by the device of reimbursing them for fraudulently overstated expenses. *See* PT-435 (Samuel Report).

317. While some of the testimony of defendants' own witness, Fatah Azami, inferentially supports these conclusions, the primary basis for these findings is the detailed report of Anthony B. Samuel, lead partner of the Intellectual Property & Licensing Disputes Group of the Forensic Services Practice in the London office of the accounting firm of Price WaterhouseCoopers. *See* PT-435 (Samuel Report) at Appendix 1. Mr. Samuel, a Chartered Public Accountant, has had substantial experience in investigating accounting issues in the telecommunications industry, and over the last nineteen years has led accounting, forensic accounting, and/or valuation assignments in Europe, Asia, the United States, Australia, and numerous other countries around the world. *See* PT-435 (Amuel Report) at Appendix 1. In addition, Mr. Samuel testified at the trial, and responded to specific inquires from

the Court. The Court found his testimony to be credible and soundly based.

318. Mr. Samuel's analysis of the flow of funds involves a detailed review of thousands of individual banking transactions from many sources, which Mr. Samuel compiled in a summary exhibit that shows each transaction in chronological order. *See* PT-284 (Appendix to Samuel Report); PT-284A (supplement to Appendix 7). Although, as noted, Mr. Samuel's review was handicapped by defendants' refusal to be deposed and to produce numerous responsive documents, he was able to satisfactorily document the following conclusions:

- In 1999-2001 the total amount diverted by defendants was $1.135 billion or more.
- At least $583 million in cash and other assets was directly diverted from Telsim to entities owned and controlled by the Uzans;
- Of this $583 million in diversions, $133 million was diverted from Telsim to the offshore entities, which were then used to transfer $90.1 million in cash directly to the individual defendants and $77.9 million to pay and/or maintain assets for the individual defendants' personal benefit, including at least four yachts, seven luxury apartments in the Trump World Tower, two jet planes, one helicopter, personal credit card bills, etc., funded at least in part by funds from Telsim.
- An additional $552 million in overstated or suspicious "expenses" paid to Uzan-related companies more likely than not represents additional diversion to defendants. Further, there is unrefuted evidence that additional subscriber revenues that were supposed to go to Telsim were siphoned off and never reached Telsim's accounts, and instead were diverted to defendants and/or entities they control.

- When viewed together, the pattern of payments to and from Telsim and each related party indicates clearly that the overall picture is one of a single group operation, with the Uzans using funds from various sources as they saw fit and for their own personal use and benefit. Indeed, during the period of the MCC and Nokia loans, the individual Uzan defendants received over $296 million in or for their personal accounts.
- Finally, Mr. Samuel found that defendants' inability to cause Telsim to repay plaintiffs' loans was unrelated to any claimed changed economic circumstances in Turkey in late 2000 and the devaluation of the Turkish lira in February 2001 (the components of the alleged "economic *force majeure*"). Rather, it was caused by defendants' aforementioned diversion of monies from Telsim. (Although, apart from the Samuel Report, plaintiffs adduced considerable other evidence convincingly refuting defendants' claims of "economic *force majeure*," defects in plaintiffs' equipment, etc., the Court need not reach any of this, since defendants waived all such defenses by declining to appear at trial. In addition, these defenses were raised at the preliminary injunction hearing, but the Court found them entirely unconvincing, as shown by its conclusion that plaintiffs had shown substantial likelihood of success).

319. The Court has very carefully reviewed the Samuel Report and finds its conclusions fully supported by the evidence referenced therein. It would serve no useful purpose to reproduce here the 133 pages of the Samuel Report, plus exhibits and Supplemental Report. Rather, the Court hereby adopts as its own findings the entirety of the Samuel Report, which will be filed contemporaneously with the Clerk of the Court.

320. In addition, the fact of the siphoning, if not its amount, is further corroborated by the unrebutted sworn statements of two knowledgeable individuals. The first individual is Tarik Camanli, a former Telsim employee who served as regional sales director. *See* PI-4 (Declaration of Tarik Camanli dated March 23, 2002 ("Camanli Decl.")). In his declaration, he states that he personally observed the diversion of "money from Telsim for the Uzans' personal use and for use by the Uzan companies." PI-4 (Camanli Decl.) ¶¶ 1-5. He states that diversion of revenue took place through the Uzan-owned company Standart Paz. *See id.* ¶¶ 13-16. According to Mr. Camanli, in July of 2001, Telsim required all of its dealers to make payments to Standart Paz instead of Telsim. *See id.* He further indicates that Standart Paz is essentially a shell company with no employees of its own that was used to divert and launder revenues. *See id.*

321. Camanli's testimony is corroborated by the sworn declaration of Kenan Yusuf Aktay. *See* PI-1 (Declaration of Kenan Yusuf Aktay dated February 4, 2002 ("Aktay Decl.")). Until January 2001, Mr. Aktay was a Telsim dealer. According to Mr. Aktay, dealers were required to make payments to Standart Paz instead of Telsim. *See* PI-1 (Aktay Decl.) ¶¶ 1-3, 10.

322. Additionally, although it is detailed in the Samuel Report, the Court takes special note, for both jurisdictional and attachment purposes, that the following New York properties were purchased by three of the individual defendants with monies diverted from Telsim via the official entities:

Address	Owner	Purchase price ($)	Date
845 UN Plaza Unit #59C	Luna	1,600,000	26 April 1999

845 UN Plaza Unit #59D	Luna	1,225,000	26 April 1999
845 UN Plaza Unit #80B	Cem Uzan	3,151,900	26 April 1999
845 UN Plaza Unit #89A	Hakan Uzan	6,171,400	26 April 1999
845 UN Plaza Unit #89B	Hakan Uzan	8,036,700	26 April 1999
845 UN Plaza Unit #90A	Cem Uzan	7,665,000	26 April 1999
845 UN Plaza Unit #90B	Cem Uzan	9,975,000	26 April 1999
515 Park Avenue #19	Cem Uzan	6,150,000	14 January 2000
515 Park Avenue Unit #3K	Cem Uzan	300,000	14 January 2000

See PT-435 (Samuel Report) ¶¶ 10.3-10.10.

323. Further, the Court notes that, during the period of the MCC and Nokia loans, the individual defendants received over $296 million into their personal accounts, most or all of which can be imputed, directly or indirectly, to the loan monies diverted from Telsim. These amounts can be seen in the bank records entered into evidence by plaintiffs. *See* PT-435A (Supplemental Samuel Report) at Appendix 11; PT-284 (Appendix 7 to Samuel Report); PT-285 (bank statements).

The Dilution of the Collateral

324. Immediately preceding plaintiffs' declarations of default, defendants, recognizing that they could no longer stall plaintiffs with false representations as to forthcoming funding and the like, and further recognizing that defendants were therefore in jeopardy not only of having the collateral foreclosed but also thereby losing control of Telsim, took steps to carry out what the Court finds was always their intention: to dilute the value of the collateral and totally eviscerate its rights respecting Telsim.

325. On April 24, 2001, immediately preceding the due date of a $700 million payment to MCC, the shareholders of Telsim held a secret and specially called meeting, without the knowledge of MCC, Nokia, or ABN-AMRO Bank, at which they resolved that the number of outstanding shares of Telsim would be tripled, from 12,924,000 to 38,772,000. *See* PI-36 (Telsim shareholder meeting report dated April 24, 2001).

326. Defendants Hakan Uzan, Cem Uzan, and Aysegul Akay all signed the resolutions authorizing the actions at the April 24, 2001 Dilution Meeting. *See* PI-36 (Telsim shareholder meeting report dated April 24, 2001); PT-436 (Responses to MCC Requests to Admit) at Response No. 129.

327. In addition to being directors of Telsim as of May 7, 2001, defendants Cem Uzan, Hakan Uzan, and Aysegul Akay were all shareholders of Standart Telekom, together owning 494 of the 500 outstanding shares of Standart Telekom. *See* PI-37 (Standart's list of shareholders dated May 7, 2001); PT-436 (Responses to MCC Requests to Admit) at Response Nos. 131-133. Akay owned 100 shares, and her brothers Cem and Hakan Uzan each owned 197 of the 500 outstanding shares. *See id.* The combined ownership of the three was 98.8% of Standart Telekom.

328. Additionally, at the time of the April 24, 2001 meeting, defendants owned 480 of the 500 outstanding shares of Rumeli Telefon, with Cem Uzan, Kemal Uzan, Hakan Uzan, and Aysegul Akay each owning 120 shares, totaling 96% of the outstanding shares. *See* PT-436 (Responses to MCC Requests to Admit) at Response Nos. 124-128.

329. Prior to the meeting, the Uzan entities Rumeli Holding and Rumeli Telefon respectively owned 21.99% and 73.63% of Telsim's shares. *See* PT-436 (Responses to MCC Requests to Admit) at Response No. 135; PI-36 (Telsim shareholder meeting report dated April 24, 2001).

330. Rumeli Telefon, in turn, had pledged to MCC shares that represented 66% of the outstanding shares of Telsim as collateral for MCC's loans; Rumeli Telefon had further pledged additional shares that represented 7.5% of the outstanding shares of Telsim to ABN-AMRO Bank. *See* PI-100 (letter dated August 16, 2001 from Rumeli Telefon to MCC); PI-122 (September 2000 amendment to Pledgeholder Agreement between MCC and Rumeli Telefon dated July 2, 1998); DX-37 (share pledge agreement between Rumeli Telefon and ABN-AMRO Bank).

331. In furtherance of defendants' scheme to defraud MCC and Nokia and steal their security, the Uzans thereupon caused Rumeli Telefon to waive its preemptive right to subscribe to a proportional amount of the newly authorized Telsim stock, notwithstanding the fact that the additional shares were offered on advantageous terms and for a nominal price. *See* PT-436 (Responses to MCC Requests to Admit) at Response No. 138; PI-36 (Telsim shareholder meeting report dated April 24, 2001). Had Rumeli Telefon exercised its rights, it would have retained its 73.63% pro rata share of Telsim's stock. *See* PT-436 (Responses to MCC Requests to Admit) at Response No. 139.

332. Rumeli Telefon's failure to exercise its rights to take up the newly issued shares diluted its ownership interest and, in turn, devaluated plaintiffs' collateral. *See* PT-436 (Responses to MCC Requests to Admit) at Response Nos. 140-143, 151; PI-36 (Telsim shareholder meeting report dated April 24, 2001).

333. Simultaneously with Rumeli Telefon's waiver of its preemption rights, the Uzans caused the shareholders of Telsim to transfer Rumeli Telefon's waived preemption rights to defendant Standart Telekom. *See* PT-436 (Responses to MCC Requests to Admit) at Response No. 140; PI-36 (Telsim shareholder meeting report dated April 24, 2001).

334. As a result of these actions, Rumeli Telefon's interest in Telsim was intentionally reduced to 24.54% (one-third of the original 73.63%). *See* PT-436 (Responses to MCC Requests to Admit) at Response Nos. 123, 141; PI- 36 (Telsim shareholder meeting report dated April 24, 2001).

335. In addition, MCC's collateral was intentionally reduced from 66% of the outstanding capital shares of Telsim to approximately 22% of such shares. *See* PT-436 (Responses to MCC Requests to Admit) at Response No. 151; PT-458 (Fatih Azami testimony at PI hearing) at 706; PI-36 (Telsim shareholder meeting report dated April 24, 2001). Similarly, Nokia and ABN-AMRO Bank's security interest was intentionally reduced from 7.5% to 2.5%. *See* PT-458 (Fatih Azami testimony at PI hearing) at 706; PI-36 (Telsim shareholder meeting report dated April 24, 2001).

336. At the same time, however, Uzan-owned-and-controlled Standart Telekom's interest in Telsim increased from 0.32% to 66.48%, of which 49.089% was derived from the proportion of the collateral shares that Rumeli Telefon had in effect relinquished. *See* PT-436 (Responses to MCC

Requests to Admit) at Response No. 142; *see also Motorola Credit Corp.* v. *Uzan*, 322 F.3d 130, 138 n.5 (2d Cir. 2003).

337. Defendants Hakan Uzan, Cem Uzan and Aysegul Akay signed the amendment to Telsim's articles of association, which increased the shares of Telsim and reflected the dramatic increase in Standart Telekom's percentage ownership. *See* PI-36 (Telsim shareholder meeting report dated April 24, 2001); PT-436 (Responses to MCC Requests to Admit) at Response No. 143.

338. This fraudulent dilution in value of assets pledged to MCC and Nokia thus also resulted in a transfer of value directly from MCC and Nokia to Standart Telekom, an Uzan-controlled entity in which MCC and Nokia do not hold an interest and which thereby was unjustly enriched. *See* PT-1193 (Kramer Decl. dated January 28, 2002) ¶ 54.

339. This transfer would have constituted a fraud on MCC and Nokia even if they had received notice of it in advance. But in fact at no time prior to this meeting were MCC or Nokia informed that it would occur, nor were they warned about the actions to be taken at the meeting. *See* PT-458 (Edward Hughes testimony at PI hearing) at 80-82, 89; PT-458 (Ernst Kramer testimony at PI hearing) at 465-466; PT-458 (Fatih Azami testimony at PI hearing) at 852. Indeed, Nokia only learned of the collateral dilution in June 2001. *See* PT-458 (Ernst Kramer testimony at PI hearing) at 465-466.

340. The fact that notice was published in the Turkish Trade Chronicle Newspaper on April 5, 2001 did not provide notice to MCC or Nokia of the Uzans' intention to dilute plaintiffs' pledged interests. Defendants' own witness admitted at the preliminary injunction hearing that the Turkish Trade Registry is not generally available. *See* PT-458 (Professor Omer Teoman testimony at PI hearing) at 994. Moreover, the Court finds that the fact that defendants resorted to publication in a little known or read

trade publication is simply further evidence of defendants' fraudulent intent.

341. Moreover, far from seeking to provide notice to MCC and Nokia, the Uzans throughout this period were purposefully misleading MCC and Nokia by pretending to negotiate with plaintiffs about Telsim repaying the loans, all the while planning to dilute plaintiffs' security. *See* PT-436 (Responses to MCC Requests to Admit) at Response No. 121.

342. For example, on April 7, 2001, Hakan Uzan emailed Keith Bane, copying Cem Uzan and Telsim executives Enver Ibek, Fatih Azami, Deniz Turhan, and defendant Luna, to discuss Hakan Uzan's impending plans for a meeting in New York. In this meeting there was no mention of the April 24, 2001 meeting, despite the fact that the notice had already gone out to shareholders. *See* PI-361 (email dated April 7, 2001 from Hakan Uzan to Keith Bane); *see also* PT-25 March 26, 2001 letter from Hakan Uzan to Keith Bane.

343. Similarly, on April 9, 2001, Hakan Uzan again emailed Keith Bane, this time copying Edward Hughes and Cem Uzan, to inquire about the meeting in New York that was to be held the following Wednesday, April 11, 2001. This email made no mention of the April 24, 2001 meeting or the plans to steal MCC's and Nokia's security. *See* PI-90 (email dated April 9, 2001 from Hakan Uzan to Keith Bane). A second email sent that day from Hakan Uzan to Keith Bane and copying Edward Hughes, Cem Uzan and Enver Ibek indicated that Enver Ibek, defendant Luna, Fatih Azami, and Hakan Uzan would be present at the New York meeting. Again no mention was made of the impending dilution of plaintiffs' collateral. *See* PI-96 (email dated June 11, 2001 from Hakan Uzan to Keith Bane).

344. Although Edward Hughes did not attend the April 11, 2001 meeting, when he telephoned Hakan Uzan

about the meeting there was no mention of the upcoming dilution meeting in Turkey or the fact that a notice of it had gone out to shareholders. *See* PT-458 (Edward Hughes testimony at PI hearing) at 80-81.

345. At the actual meeting in New York City on April 11, 2001, less than two weeks before the dilution meeting was to occur, no mention was made of it, although Hakan Uzan knew that the dilution was scheduled to occur. *See* PT-458 (Fatih Azami testimony at PI hearing) at 706-707.

346. Finally, on April 20, 2001, Hakan Uzan sent an email following up on the New York meeting to Keith Bane and Rick Severns of MCC, copying Cem Uzan, and stating, "We hope that we will find mutually acceptable and beneficial resolutions to the open tasks, and therefore also expect that [MCC] will halt all notifications and will suspend all contractually working time frames . . . ." PI-91 (email dated April 20, 2001 from Hakan Uzan to Keith Bane and Rick Severns). Again, there was no mention of the dilution.

347. In other words, at the very time that Hakan Uzan was suggesting that MCC not take adverse action against Telsim pending the ongoing discussions, he purposely concealed from plaintiffs that the Uzans had already initiated their plan to dilute plaintiffs' pledged interest in Telsim's shares. *See* PI-36 (statement in Telsim shareholder meeting report dated April 24, 2001 that notice of dilution meeting occurred on April 6, 2001) at 1.

348. Indeed, at the preliminary injunction hearing, Mr. Azami testified that Telsim's entire executive board recognized that the dilution was wrong and that Telsim's shareholders—the Uzans—were obligated to restore plaintiffs' pledged interests. *See* PT-458 (Fatih Azami testimony at PI hearing) at 711. Nevertheless, despite this representation, defendants have taken no actions to fulfill this promise.

349. As for defendants' purported excuses for their actions surrounding the April 24, 2001 dilution, the Court finds them to be palpable shams. For example, while Hakan Uzan claims that Telsim's shares were tripled to comply with Article 324 of the Turkish Commercial Code, *see* PT-454 (Hakan Uzan Decl. dated March 14, 2002) ¶¶ 49, 144, which requires that a company take steps to increase its capital when the company loses two thirds of its capital, *see* PT-458 (Fadlullah Cerrahoglu testimony at PI hearing) at 603-604, defendants' own expert witness, Professor Omer Teoman, testified that due to the market price revaluation Telsim obtained in April of 2001 (including revaluation of Telsim's GSM license at $1.8 billion), Telsim had already satisfied Article 324 before the April 24 meeting. *See* PT-458 (Omer Teoman testimony at PI hearing) at 1001-1002. Secondly, plaintiffs' Turkish law expert, Dr. Fadlullah Cerrahoglu, testified that a recapitalization was not necessary under Article 324 due to the revaluation Telsim had already obtained. *See* PT-458 (Fadlullah Cerrahoglu testimony at PI hearing) at 602-604. These, and defendants' other purported explanations for the dilutions, are, the Court finds, blatant sophistry designed to conceal their fraud even from this Court.

350. Not content with the April 2001 dilution, on January 4, 2002, the Uzans initiated a general assembly meeting of the Telsim shareholders for the purpose of further diminishing the value of the collateral. *See* PI-38 (Telsim shareholder meeting agenda dated January 4, 2002); PT-436 (Responses to MCC Requests to Admit) at Response Nos. 154-155.

351. At this meeting, the Uzans (1) voted to create a privileged class of shares (the "Class A shares") controlled by the Uzans and unencumbered by any pledge to MCC or Nokia, with authority to nominate four of Telsim's five directors and all three of Telsim's statutory auditors, and (2) voted to allow Telsim to become a member of

foundations, entities whose assets are materially harder for creditors to reach. *See* PI-38 (Telsim shareholder meeting agenda dated January 4, 2002); PI-39 (minutes of January 4, 2002 Telsim shareholders meeting); PT-458 (Fadlullah Cerrahoglu testimony at PI hearing) at 613; PT-436 (Responses to MCC Requests to Admit) at Response No. 159.

352. The January 4, 2002 meeting was held over the objection of Detecon Gmbh ("Detecon")—a company that owns less than one-half of one percent of Telsim and is the only non-Uzan related shareholder—which had objected to the meeting on the grounds that the notice and the proposed actions were not in accordance with law or with the principles of good faith. Indeed, Detecon had itself received notice of the meeting only one day before it occurred. *See* PI-39 (minutes of January 4, 2002 Telsim shareholder meeting). No timely notice whatsoever was given to plaintiffs.

353. The Court rejects defendants' suggestion that they created a preferential class of Telsim stock in order to attract a foreign investor because (1) the evidence shows that no such potential investor existed as of January 2002, *see* PT-445 (Paul Raphael Deposition) at 128; PT-444 (Sean Carney Deposition) at 77-78; (2) the evidence already discussed above overwhelmingly demonstrates that the Uzans never intended to sell Telsim; (3) the extraordinary control rights that the January 4 resolutions gave the Uzans would have made acquisition of the company less desirable to an outside investor; and (4) the Uzans' failure to inform plaintiffs of the January 4 meeting creates a strong inference that the Uzans intended to damage plaintiffs.

354. Rather, the obvious purpose of the resolutions of the January 4, 2002 general meeting was to further diminish the value of plaintiffs' collateral and deprive plaintiffs of attendant rights.

355. Shortly after the January 4, 2002 meeting, the instant lawsuit was commenced. In a sworn declaration filed with this Court in March 2002, Hakan Uzan expressly pledged that the January 4, 2002 resolution would not be registered with the Turkish government and, therefore, would not take effect, *see* PT-454 (Hakan Uzan Decl. dated March 14, 2002) ¶ 153. In addition, on May 9, 2002, the Court issued an order prohibiting defendants and their agents from taking any step, directly or indirectly, to "certificate, transfer, encumber, or affect in any way whatever" the collateral or its "value, status, and/or availability to this Court." Order dated May 9, 2002. Nonetheless, just one day later, on May 10, 2003, defendants undertook registration of the January 4 resolutions, which was thereafter accomplished. *See* C-29 (Declaration of Ece Unlu dated May 23, 2002); C-30 (registration of January 4, 2002 amendments to Telsim's articles of association); C-126; PT-436 (Responses to MCC Requests to Admit) at Response Nos. 161, 163 (Defendants admit they requested registration, that Hakan Uzan made the decision to seek registration, and that the Turkish government has in fact registered the resolutions).

356. As the Court has previously held, the Court wholly discredits Hakan Uzan's subsequent testimony to this Court that the registration occurred inadvertently, with no intent to break his prior sworn promise to the Court or to act in contempt of its orders. *See* Opinion and Order, dated August 22, 2002, 2002 WL 1963301 at *2-3. Rather, the registration was part of the fraud, and Hakan Uzan's testimony was simply one more attempt to disguise the fraud with false statements. *See id.*; *see also* PT-459 (Hakan Uzan testimony at contempt hearing) at 19.

The False Criminal Charges in Turkey

357. Although various of the agreements between plaintiffs and Telsim obligated Telsim to provide plaintiffs with complete financial information, *see, e.g.*, DX-15 (February 1, 2000 Amendment to Share Pledge Agreement) at 6, defendants repeatedly declined to fulfill these obligations, giving a host of pretexts. Accordingly, when plaintiffs reached the point of declaring defaults, they hired the well-known financial investigative firm of Kroll Associates to go to Turkey to try to uncover the facts.

358. In retaliation, and both to help conceal the fraud and to extort concessions from the plaintiffs, the Uzans first threatened to file and then did file materially false criminal charges against high level executives of plaintiffs and their affiliates.

359. Thus, on July 17, 2001, Hakan Uzan explicitly threatened plaintiffs with the filing of false criminal charges by sending an email to Chris Galvin and Keith Bane, stating that he would initiate "very messy and potentially harmful criminal proceedings" against MCC and its executives. PI-98 (email dated July 17, 2001 from Hakan Uzan to Chris Galvin); *see also* PT-436 (Responses to MCC Requests to Admit) at Response No. 192. The email was copied to Cem Uzan and Luna.

360. Then, on July 23, 2001, days before a scheduled meeting between defendants and MCC, Hakan Uzan and Cem Uzan filed false allegations against various executives of Motorola, Inc., Motorola Turkey, and Nokia, charging the executives with making an "explicit and armed threat to kill" them and their families. *See* PI-99 (Turkish criminal complaint); *see also* PT-436 (Responses to MCC Requests to Admit) at Response No. 191.

361. This allegation was unsupported by anything other than the criminal complaint filed by Hakan Uzan and Cem

Uzan, which in turn purported to be based on newspaper reports that Kroll Associates were "hunters" and "experts in kidnapping." PI-99 (Turkish criminal complaint). The actual newspaper articles in question, however, simply said that Kroll Associates had experience in *rescuing* kidnapping victims, hunting for stolen assets, and solving crimes. *See* DX-430 (Hurriyet article dated July 17, 2001); PT-458 (Necmi Yuzbasioglu testimony at PI hearing) at 1014-1015.

362. Moreover, defendants' own witness at the preliminary injunction hearing testified that he was aware of no basis for the charges, *see* PT-458 (Necmi Yuzbasioglu testimony at PI hearing) at 1017-1019, and Telsim's CFO at the same hearing admitted that the charges were "ridiculous" and that he would "never think that one of the executives here will commit such a thing." PT-458 (Fatih Azami testimony at PI hearing) at 859. Nor was Hakan Uzan when he testified at the contempt hearing able to point to any evidence supporting the charges in his testimony before this Court. *See* PT-459 (Hakan Uzan testimony at contempt hearing) at 124-126, 129.

363. After the filing of the false criminal charges, defendants sought to use them in further acts of extortion to extract concessions from plaintiffs. For example, at an August 2, 2001 meeting between Nokia, ABN-AMRO Bank, and Fatih Azami, Mr. Azami stated that the Uzans would withdraw the criminal charges if Nokia would renegotiate Telsim's payment schedule. *See* PT-458 (Ernst Kramer testimony at PI hearing) at 471. While the extortion predicates contained in the RICO claims are not presently before the Court, the evidence is relevant to the assessment of punitive damages, as well as defendants' consciousness of guilt, on the fraud claims.

364. Ultimately, the Turkish court dismissed the charges against the first group of executives whose cases proceeded to trial, holding there was insufficient evidence to support

the charges. *See* PI-12 (Turkish criminal case hearing transcript and decision dated March 14, 2002). However, charges still remain pending against certain executives of plaintiffs and their affiliates, charges which defendants have continued to press throughout the pendency of this action.

365. The filing of false criminal charges is a tactic that the Uzans have used before to extort demands in their business dealings. Thus, Ferda Yildiz (a Telsim supplier) testified at the preliminary injunction hearing that Hakan Uzan and Cem Uzan brought false criminal charges against him, which charges were eventually dismissed, in an attempt to intimidate him for their business advantage. *See* PT-458 (Ferda Yildiz testimony at PI hearing) at 549-550.

The Defendants' Contempts

366. In an effort to avoid redress for their wrongs and further subvert the administration of justice, defendants have carried their fraud into this and other courts by, *inter alia*, defying court orders, concealing information from the Court, and falsely representing facts to the Court.

Contempt Relating to the Court's Orders

367. Defendants have failed to comply with this Court's express orders regarding the pledged Telsim stock. To begin, as previously noted, on May 10, 2002, one day after the Court issued its preliminary injunction order prohibiting defendants from taking any action to dilute their pledged interest, Hakan Uzan, in violation of the Court's order and his own express promise to the Court, successfully petitioned the Turkish government to register the January 4, 2002 amendments to Telsim's articles of association, thereby further impairing the collateral.

368. On May 28, 2002, defendants' counsel for the first time informed the Court that defendants allegedly could not

comply with the requirement of the Court's Order dated May 9, 2002 that defendants deposit 73.5% of Telsim's stock in the Court's registry because three Telsim distributors had obtained injunctions from Turkish courts purporting to prohibit the transfer of Telsim stock outside of Turkey. Upon the Court's inquiry, defendants' counsel disclosed that he was aware of the Turkish injunctions by late April or early May 2002 (*i.e.*, before the Court had issued its May 9 preliminary injunction order) but had not disclosed these injunctions to this Court or to the Court of Appeals in seeking an emergency stay on May 22, 2002. *See* Opinion dated August 22, 2002, 2002 WL 1963301 at *5.

369. At the June 10, 2002 contempt hearing, Hakan Uzan testified (1) that he had "forgotten" that he had represented to the Court by sworn declaration that he would hold the January 4, 2002 amendments in suspense; and (2) that he had not yet decided whether to comply with the preliminary injunction even if the Turkish injunctions were resolved. *See* PT-459 (Hakan Uzan testimony at contempt hearing) at 19, 48-49.

370. Following the contempt hearing, the Court, by Order dated August 22, 2002, found defendants in civil contempt for their failure to abide by the preliminary injunction order. The Court concluded that the Turkish distributor suits were largely the product of collusion between the Uzans and the plaintiffs in those cases and that the Uzans' decision to conceal the Turkish injunctions from the Court until May 28, 2002 was designed "to conceal as long as possible their involvement in these collusive suits and their intent to use them, if all else failed, to subvert the orders of this Court and of the Court of Appeals." Opinion dated August 22, 2002, 2002 WL 1963301 at *5. In addition, the Court found "incredible on its face" Hakan Uzan's testimony that he had "forgotten" his representation to the Court that he would hold the January 4, 2002 amendments in suspense. *Id.* at 2 n.2.

371. Notwithstanding the Court's contempt order, defendants have not reversed the January 4, 2002 amendments, even though it has been at all times in their control to do so and despite their representations to the Court that they would take steps to reverse the amendments. *See* Transcript dated October 1, 2002, at 51. Nor have defendants deposited any of Telsim's stock into the Court's registry.

372. On September 30, 2002 and October 15, 2002, the Court issued orders requiring defendants not to further pursue three Swiss arbitrations that defendants and the companies they control had initiated after plaintiffs had filed the instant action. With respect to these arbitrations, the Court stated that "it is painfully obvious that they were commenced in an effort to undercut the prior orders of, and proceedings before, this Court." Opinion dated October 15, 2002, at 7.

373. Despite the Court's order, on November 27, 2002, defendants filed an action in the Turkish Civil Court of Kucukcekmece against plaintiffs and their affiliates, and obtained an *ex parte* injunction purporting to stay the present action and to vacate the preliminary injunction and attachments orders issued by this Court. Recognizing that the November 27 suit was an overt attempt to interfere with the jurisdiction of this Court and was "initiated by defendants in contravention of and in a tactical effort to evade the prior orders of this Court," the Court issued an Order on January 6, 2003 commanding defendants and those acting in concert with them to withdraw the November 27 suit as well as an attachment suit filed by defendants on June 19, 2002. *See* Opinion dated January 6, 2003, 2003 WL 56998 at *2-3. The Court further ordered defendants to refrain from filing any similar actions in the future. *See id.* at *3.

374. In defiance of this order, defendants not only failed to seek withdrawal or dismissal of the November 27 or June

19 Turkish suits, but also, as found by Justice Gross in ancillary English proceedings, caused Telsim employees to file a suit in Turkey on or about January 17, 2003, once again seeking (and obtaining) an injunction purporting to stay the present action as well as ancillary actions in England, France, Germany, Switzerland, Bermuda, and Guernsey. *See* PT-467 (unapproved opinion of Gross, J. dated January 31, 2003) at 19. Indeed, in opposing plaintiffs' most recent motion for a finding of contempt, defendants tacitly conceded that the Telsim employees acted at defendants' behest in filing the January 17, 2003 Turkish injunction suit.

375. With respect to discovery, Magistrate Judge Maas (to whom the Court referred certain discovery aspects of this case) has stated his "clear sense" that defendants did not produce all responsive documents they were required to produce. *Motorola Credit Corp.* v. *Uzan*, 02 Civ. 666(JSR) (FM), 2003 WL 203011, at *1 (S.D.N.Y. Jan. 29, 2003).

376. Defendants have also failed to comply with Magistrate Judge Maas' order that they sign forms consenting to the release of their foreign bank records. *See id.* at *8.

377. Defendants also misled Magistrate Judge Maas with respect to their intention to appear for depositions. First, on October 2, 2002, defendants refused to appear for depositions scheduled to take place in Spain, offering instead to appear for depositions in Switzerland. *See id.* at *2. On October 28, 2002, however, defendants decided that Kemal Uzan, Melahat Uzan, and Akay would not appear for depositions scheduled to take place that week in Zurich and that they would not make key Telsim employees available for depositions scheduled to take place the same week in London, stating that the depositions might somehow affect Cem Uzan's candidacy in upcoming Turkish elections. The Court finds defendants' explanation palpably implausible as Magistrate Judge Maas had already ruled that until after

the Turkish elections, defendants' counsel would keep custody of the only copies of the videotape of these depositions. *See id.* at *3.

378. As a result, Magistrate Judge Maas directed that the depositions previously scheduled to take place in Zurich be held there beginning on November 12, 2002, and that those previously scheduled to take place in London take place there beginning on November 14, 2002. *See id.* But on November 8, 2002, defendants' counsel informed plaintiffs and the Court that defendants had decided not to appear for the depositions scheduled to take place on November 12, 2002. *See id.* Thereafter, on November 19, 2002, Magistrate Judge Maas directed that Cem Uzan, Hakan Uzan, Luna, and representatives of the corporate defendants appear for depositions in New York, London, or Zurich on or before November 22, 2002. Defendants once again disobeyed the Magistrate Judge's Order and failed to appear. *See id.*

379. Magistrate Judge Maas then ordered defendants to pay MCC $128,411.59 and Nokia $49,236.00 for the costs incurred by plaintiffs in preparing for the depositions that the Uzans canceled in violation of the Court's orders. *See id.* at *6. In so finding, Magistrate Judge Maas found that the Uzans "knowingly and without justification refused to comply with this Court's proper discovery orders." *Id.* at *4. In a further act of contempt, defendants have failed to pay these amounts to plaintiffs.

Contempt in Foreign Ancillary Proceedings

380. Defendants have repeatedly misled courts presiding over ancillary proceedings in foreign jurisdictions in an effort to interfere with those courts' administration of justice and with plaintiffs' ability to obtain a remedy in this action.

381. On January 30, 2002, two days after plaintiffs filed the present action, MCC moved in the English High Court of Justice, Queen's Bench Division, for a freezing order prohibiting Cem Uzan from disposing of any assets in England and Wales up to a maximum value of $50 million. *See* PT-279 (transcript dated December 20, 2002 recounting procedural history of English case) at 4; PT-259 (freezing order dated January 30, 2002). Justice Cresswell granted the motion and ordered Cem Uzan to disclose all of his assets in England and Wales. *See* PT-279 (transcript dated December 20, 2002) at 4; PT-259 at 12 (freezing order dated January 30, 2002).

382. On May 30, 2002, MCC returned to the English Court and obtained a freezing injunction against Cem Uzan, Kemal Uzan, Hakan Uzan, and Akay, freezing their assets worldwide up to a total value of $200 million each. These orders similarly required these four defendants to disclose all assets worldwide with a value in excess of £10,000. *See* PT-278 (transcript dated January 20, 2003) at 1 (unapproved judgment describing procedural history of case); PT-279 (transcript dated December 20, 2002) at 6-7. Cem Uzan and Akay applied to stay the disclosure requirements of the worldwide freezing order but that application was denied. The English court has described Cem Uzan and Akay as having made this request "for no apparent good reason." PT-279 (transcript dated December 20, 2002) at 7. The Court of Appeals denied Cem Uzan and Akay's appeal of the English Court's refusal to stay its disclosure orders. *See* PT-278 (transcript dated January 20, 2003) at 1 (unapproved judgment describing procedural history of case); PT-279 (transcript dated December 20, 2002) at 7-8. Defendants applied to have the freezing orders set aside, but the English court denied those applications on July 22, 2002. *See* PT-279 (transcript dated December 20, 2002) at 8-12.

383. On July 25, 2002, MCC moved for an order requiring Cem Uzan and Akay to appear for cross-examination on their assets based on their failure to submit proper asset disclosures. Justice Steel of the English court gave these defendants "'a last opportunity to put their house in order.'" PT-279 (transcript dated December 20, 2002) at 12. On August 12, 2002, MCC renewed its request for cross-examination of Cem Uzan and Akay based on the clear inadequacies of their asset disclosures. Upon reviewing Cem Uzan and Akay's asset disclosures, Justice Steel ordered these defendants to appear in court for cross-examination as to their assets. In ordering this cross-examination, Justice Steel stated as follows:

> Suffice it to say for the moment that there is a wealth of material here which both viewed in isolation and in the round suggests very strongly that these defendants have failed to make any real attempt to make full and frank disclosure of their asset position.

PT-270 (judgment of Justice Steel dated August 12, 2002) at 749.

384. Justice Steel further noted the Uzans' strategy of misleading the Court as to their assets and then admitting the true facts only after MCC could prove that they were lying:

> The claimants have more than made out their assertion that the defendants have been very reluctant to adduce a full and complete list of their shareholdings until the claimants themselves rub their nose in those holdings which they have been able to unearth.

PT-270 (judgment of Justice Steel dated August 12, 2002) at 748. The English Court further denied the application of Cem Uzan and Akay to appeal the order requiring that they appear for cross-examination on their assets. The English court subsequently ordered Cem Uzan and Akay to appear

in court for cross-examination on November 19, 2002 and November 20, 2002, respectively. *See* PT-279 (transcript dated December 20, 2002) at 15.

385. Cem Uzan and Akay did not appear on November 19, 2002 or November 20, 2002 for their court-ordered cross-examinations. As a result, the English court scheduled a committal hearing for November 28, 2002 to consider MCC's request that Cem Uzan and Akay be sentenced to confinement for failing to appear for cross-examination. After hearing from counsel for the parties on November 28, 2002 and November 29, 2002, Justice Gross issued an order finding Cem Uzan and Akay in contempt. The court further ordered that Cem Uzan and Akay appear on December 16 and 17, 2002, either in court or by video link, to be cross-examined on their asset disclosures. *See* PT-279 (transcript dated December 20, 2002) at 19-20. When Cem Uzan and Akay failed to appear for these cross-examinations, the English court sentenced them to confinement for fifteen months and six months, respectively. *See id.* at 41. The court concluded its judgment by stating: "The message of this court is simple: no one is above the law; the court's orders are to be obeyed; the game of non-compliance is not worth the candle." *Id.* at 42. The English court also has found that the Turkish injunction of November 27, 2002 did not prohibit the English court from requiring defendants' attendance. *See* PT-279 (transcript dated December 20, 2002) at 36 ("The first and fourth defendants have, as I have said, themselves colluded in the creation of the obstacle to their compliance.").

386. The evasions of Kemal Uzan and Hakan Uzan in the English proceeding followed a similar course. On May 30, 2002, Kemal Uzan and Hakan Uzan were ordered to disclose their worldwide assets having a value in excess of £10,000. On July 22, 2002, Justice Steel of the English court denied defendants' application to discharge the worldwide freezing order. *See* PT-278 (transcript dated

January 20, 2003) at 2 (unapproved judgment). After Kemal Uzan and Hakan Uzan "failed to provide adequate disclosure of their assets," Justice Steel ordered Kemal Uzan and Hakan Uzan to disclose their worldwide assets by August 2, 2002. *Id.* at 2.

387. On August 1, 2002, Kemal Uzan submitted an affidavit to the English court in which he offered the following excuse for his failure to disclose his assets:

> I have interests across a wide range of commercial enterprises and, therefore, it is impossible for me to accurately list all of my assets the value of which is higher than £10,000 without allocating three or four persons for a period of 6-9 months to specifically identify all such assets.

PT-448 (Affidavit of Kemal Uzan dated August 1, 2002) ¶ 2.

388. As with Cem Uzan and Akay, MCC moved for an order requiring that Kemal Uzan and Hakan Uzan appear for cross-examination based on the inadequacy of their asset disclosures. With respect to Kemal Uzan's compliance with the court's asset disclosure order, Justice Steel made the following observation at a hearing on October 18, 2002:

> All he has tendered by way of particularisation of his assets is the existence of some real estate property in the United States and the suggestion that he has a shareholding of 14.2% in Cukurova Elektrik valued at $200 million .... I am afraid to say that he has in effect made not the slightest effort to respond to the order, albeit many months have gone by. There is some evidence to suggest that even his information with regard to the shareholding he has in Cukurova Elektrik is untrue and that his shareholding may be twice as much as that. In any event, he has, from other material that I have been shown, failed to disclose a whole range of other assets, including direct

> or indirect interests in Telsim, which company he has himself described as having within its purview an asset amounting to 1.8 billion. He too is in the remarkable position of having no bank accounts or at least no bank account with more than £10,000 in it. I am satisfied that the apparent lack of frankness, indeed the admitted lack of frankness, in the scope of his disclosure, cries out for an order for cross-examination and I so order.

PT-273 (transcript of English hearing dated October 18, 2002) at 1000.

389. With respect to Hakan Uzan's asset disclosures, Justice Steel noted the following:

> The third defendant, if I may start with him, has produced an affidavit dated the 1st of August in which he discloses, first of all, a list of current shareholdings in various companies within the family group, discloses the existence of two properties in New York and three cars. Apart from the cars, which I will assume to be worth more than £10,000 each, in effect no disclosure of any asset worth more than £10,000 has been made, despite the fact that Mr. Hakan Uzan is a leading member of a family within the "Fortune 500" reported to be worth more than a billion dollars. The schedule of shareholdings, which is annexed to his affidavit, identifies the nominal or par value of his shareholdings with some companies. [Hakan Uzan's counsel], I think, recognises that the par or nominal value of these shares are of no materiality whatsoever, although I have no doubt at all that the witness intended to suggest that these values were of some assistance with regard to disclosing his asset position.

PT-273 (transcript of English hearing dated October 18, 2002) at 997. As with Cem Uzan and Akay, Kemal Uzan

and Hakan Uzan failed to appear for cross-examinations scheduled for January 20, 2003 and January 21, 2003. *See* PT-278 (transcript dated January 20, 2003) at 4.

390. On January 20, 2003, the English court found Kemal Uzan and Hakan Uzan in contempt for their refusal to appear for cross-examination. *See* PT-278 (transcript dated January 20, 2003). On January 31, 2003, Justice Gross sentenced Kemal Uzan and Hakan Uzan to imprisonment for fifteen months as a penalty for their contempt of court. *See* PT-467 (unapproved opinion of Gross, J. dated January 31, 2003) at 21.

391. In sentencing Kemal Uzan and Hakan Uzan, Justice Gross unequivocally rejected the Uzans' claims that the injunction they obtained on November 27, 2002 and the injunction Telsim employees obtained on January 17, 2003 excused defendants' failure to appear for cross-examination:

> There is nothing accidental or inadvertent about the contempt of these defendants. They were at the centre of the Uzan strategy. Their contempt is every bit as cynical and calculated as that of the first defendants. These last observations are emphasised by the very late notification of these defendants' non-attendance on 20th January.
>
> . . . .
>
> Three, as to the failure by these defendants to apply to lift or vary the [Turkish injunction] order of 27th November: (a) I am sure that, whatever the position as to the status of this order, they would not have attended on 20th January . . . (b) the 27th November order was obtained, *inter alia*, by these defendants; (c) on no view, therefore, do I view the 27th November order as mitigation for their non-attendance; (d) I am further sure that a party subject to the 27th November order who genuinely desired to

attend for cross-examination would at least have instructed his lawyers to attempt an application to lift or vary the injunction . . . . If and to the extent that the 27th November order impeded or, as a matter of Turkish law, prohibited them from [attending the court-ordered cross-examination], that was a problem of their own creation. I do not think that such considerations aggravate their position when compared with that of the first and fourth defendants. Conversely, nothing in this sorry chapter of events serves to mitigate their position.

Four, as to the 17th January ordered by Telsim employees], I am amply sure that the second and third defendants at the least colluded in obtaining it. The contrary suggestions are unreal and fanciful. In particular, I have regard here to the following: (a) the improbability of the employees seeking such an order; (b) the material which suggests that Telsim was the pawn of the Uzans; (c) the remarkable coincidence of the timing. The 17th January order appeared on the first day that an application . . . could have been made to vary or lift the 27th November order—added to the fact that this is not the first occasion when the Uzans have sought refuge in a well timed order from the Turkish court; (d) the further remarkable feature that the 17th January order served to "top up" the second and third defendants' protection; (e) the points as to drafting, which I regard as inexplicable if indeed the 17th January order had been sought independently of any involvement on the part of the Uzans, including these defendants; (f) the lack of any direct evidence from the second and third defendants that they were not involved . . . ; (g) the complete absence of any suggestion that they regretted this development and were seeking to lift or vary the order. I regard the facts concerning the 17th January [order] as a grave

> and aggravating feature of the conduct of the second and third defendants not present when I was dealing with the first and fourth defendants.

PT-467 (unapproved opinion of Gross, J. dated January 31, 2003) at 18-20.

392. Thus, as they have done in this Court, the Uzans' conduct in the English proceeding has revealed an intent to mislead courts, conceal facts, and offer false excuses for their refusal to comply with the courts' lawful orders.

Injuries

393. As a direct and proximate result of defendants' fraudulent misrepresentations, MCC was fraudulently induced to make a series of advances to Telsim and Kar-Tel between 1998 and 2001 totaling $1,975,753,069.14. In turn, defendants made $161,235,240.40 worth of payments and received $11,428,512.17 in credits for a total of $172,663,752.57, which when offset from the total amount funded, gives a total net funding by MCC of $1,803,089,316.57. *See* PT-464 (Hughes Decl.) ¶ 3. (A detailed summary of fund distributions and credits in favor of, or on behalf of, Telsim and/or Kar-Tel, is set forth in chart format ("the Chart") at PT-455 (funding by tranche summary)). These calculations are supported by direct evidence in the form of wire transfers, draw down requests, and sample wire credits. *See* PT-456 (wire transfer records); PT-30 (draw down requests); PT-457 (wire transfers). Moreover, Mr. Hughes, who has first hand knowledge of the facts and reviewed the relevant documents, averred to the accuracy of the Chart. *See* PT-464 (Hughes Decl.) ¶ 2.

394. The figure of $1,803,089,316.57 therefore represents the amount of damage suffered by MCC, exclusive of pre-judgment interest and punitive damages. Defendants have not carried their burden under Illinois law of showing that

plaintiffs have failed to mitigate these damages. Instead, while the failure to fully pursue all contractual remedies is an impediment to plaintiffs' pursuing their RICO claims at this time, the evidence before the Court demonstrates that defendants have intentionally thwarted every effort plaintiffs have made to recover the monies due them, even to the point of diluting and eviscerating the collateral, contemptuously refusing to transfer Telsim shares to the registry of this Court, hiding assets, obtaining collusive injunctions, and lying to courts here and abroad.

395. The interest calculations on the above scheme as allowed by Illinois law are detailed in the interest chart. *See* PT-455. The interest amount is calculated from the date of each relevant transaction (the date recorded on the Chart) until February 18, 2003 by applying the statutory interest rate of 5% per annum based on a 365 day year (for a daily rate of $246,998.54) and accounting for all payments and credits. *See* PT-455 (per diem calculation, third summary chart); PT-464 (Hughes Decl.) ¶ 21. Applying this same methodology through the date of this Order (July 31, 2003), the total interest is $329,807,589.09, which when added to the aforementioned amount outstanding of $1,803,089,316.57 comes to a total of $2,132,896,905.66.

396. Although the only claim by Nokia presently pending before this Court is its claim for a constructive trust, computation of the damages sustained by Nokia as a result of defendants' action is relevant, among other things, to determining the proper sanction for defendants' contempt vis-à-vis their refusal to transfer Nokia's portion of the Telsim stock to this Court's registry, *see infra*. Nokia's net injury, exclusive of interest, totals $711,000,977.23. This figure is the sum of three component parts: (1) $238,458,226.85 of equipment financing provided under so-called "Tranche A" of the relevant financing agreement; (2) $435,000,000 of cash financing provided under "Tranche B" of that agreement; and (3) $37,542,750.38 for services

and miscellaneous equipment. *See* PT-1053, PT-1003P, PT-1062, PT-1066 and PT-1078. Nokia has not submitted a calculation of interest. But, taken most conservatively, if pre-judgment interest were to be awarded on the amount in accordance with New York law (9%) from the date Nokia declared Telsim in default (May 9, 2001), through July 31, 2003, it would add $142,706,661.90 in interest, leading to an overall total of $853,707,639.13.

Conclusions of Law

Having already ruled on the motions, *see* Part I, *supra*, the Court, adopting by reference the Findings of Fact, *supra*, which will not be repeated here, reaches the following conclusions of law regarding the remaining substantive claims, to wit, MCC's claims under Illinois law for common law fraud, promissory fraud, and civil conspiracy, and both of the plaintiffs' claim under New York law for imposition of a constructive trust.

Personal Jurisdiction

1. The Court has previously ruled that it has personal jurisdiction over all the defendants, including the three corporate defendants, under section 302(a) of the New York Civil Practice Law & Rules ("CPLR"), since Cem Uzan does not dispute the Court's jurisdiction over him and since he and his agents committed substantial overt acts in New York in furtherance of a conspiracy with all the defendants to commit numerous tortious acts. *See* Memorandum Order, dated October 15, 2002, at 2-3. The dismissal of the RICO conspiracy claim in no way alters this conclusion, since the Court finds that all defendants were engaged in a civil conspiracy in violation of Illinois law that embraces all the aforementioned acts.

2. Accordingly, on this ground alone, *all* of the defendants—including the corporate defendants—are subject to jurisdiction in New York based on the actions of

their co-conspirators. *See, e.g., Best Cellars, Inc.* v. *Grape Finds at Dupont, Inc.*, 90 F. Supp. 2d 431, 446 (S.D.N.Y. 2000); *Chrysler Capital Corp.* v. *Century Power Corp.*, 778 F. Supp. 1260, 1266 (S.D.N.Y. 1991) ("It is well established that acts committed in New York by the co-conspirator of an out-of-state defendant pursuant to a conspiracy may subject the out-of-state defendant to jurisdiction under CPLR 302(a)(2).") (citations omitted). In this regard, plaintiffs have demonstrated that: "(a) the defendant[s] had an awareness of the effects in New York of [their] activity; (b) the activity in New York was to the benefit of the out-of-state co-conspirators; and (c) the co-conspirators acting in New York acted . . . 'at the request of or on behalf of' the out of state defendant[s]." *Id.* at 1269, quoting *Dixon* v. *Mack*, 507 F. Supp. 345, 350 (S.D.N.Y. 1980). All of the individual defendants were intimately aware of the scheme embracing both the loans from and the share pledges to plaintiffs, and this knowledge is imputed to the corporate defendants based on the Uzans' control over those corporations. *SEC* v. *Manor Nursing Centers, Inc.*, 458 F.2d 1082, 1089 n.3 (2d Cir. 1972); *SEC* v. *Ballesteros Franco*, 253 F. Supp. 2d 720, 728-9 (S.D.N.Y. 2003).

3. Additionally, the further findings set forth in the Findings of Fact establish other, independent bases for personal jurisdiction, as set forth below.

4. New York's long arm statute, CPLR § 302, provides in pertinent part:

> (a) As to a cause of action arising from any acts enumerated in this section, a court may exercise personal jurisdiction over any nondomiciliary . . . who in person or through an agent:
>
> 1. transacts any business within the state or contracts anywhere to supply goods or services in the state; or
>
> 2. commits a tortious act within the state . . . ; or

> 3. commits a tortious act without the state causing injury to person or property within the state . . . .

N.Y. C.P.L.R. § 302(a).

5. Under this section, a single transaction of business is sufficient to confer jurisdiction, even if the defendant never entered New York, "so long as the defendant's activities [in New York] were purposeful and there is a substantial relationship between the transaction and the claim asserted." *Kreutter* v. *McFadden Oil Corp.*, 71 N.Y.2d 460, 527 N.Y.S.2d 195, 522 N.E.2d 40, 43 (1988).

6. Here, as part of their scheme to defraud plaintiffs, defendants Kemal Uzan, Hakan Uzan, and Luna transacted business and committed fraud in New York, thereby subjecting themselves to jurisdiction under CPLR § 302(1) and (2). The following dealings are illustrative: (1) Hakan Uzan participated in negotiations concerning the Seventh Amendment to the MCC Equipment Financing Agreement from his home in New York; (2) Hakan Uzan and Cem Uzan met with MCC representatives in New York on April 11, 2001 and fraudulently represented that Telsim would take no adverse action against MCC, in order to delay any action by MCC to foreclose on the share pledge and to give defendants time to execute their scheme to dilute the value of the collateral; (3) Kemal Uzan financed $300 million of the purchase price of the GSM license through UBS A.G. in New York; (4) Hakan Uzan, Cem Uzan, and Luna engaged in money laundering activity in New York in connection with the diverted proceeds of the fraud; and (5) all of the defendants induced plaintiffs to make a multitude of wire transfers from banks in the United States to Telsim.

7. The defendants are also subject to jurisdiction pursuant to CPLR § 302(3), as it was clearly foreseeable that as a result of defendants' fraudulent acts, plaintiffs would suffer financial loss in New York.

8. Still another section of the CPLR, section 301, authorizes general jurisdiction over defendants who have such "systematic and continuous contact with New York as to be tantamount to presence within the state." *Landoil Resources Corp.* v. *Alexander & Alexander Servs., Inc.*, 918 F.2d 1039, 1044 (2d Cir. 1990). "Presence" includes conducting or purposefully "doing business" in New York, "not occasionally or casually, but with a fair measure of permanence and continuity." *Landoil Resources Corp.* v. *Alexander & Alexander Servs., Inc.*, 77 N.Y.2d 28, 563 N.Y.S.2d 739, 565 N.E.2d 488, 490 (1990) (internal quotation omitted). Indicia of such "presence" include (1) maintaining an office, (2) soliciting business, (3) maintaining bank accounts, and (4) maintaining employees or agents. *See Landoil Resources*, 918 F.2d at 1043. As the findings of fact establish, Kemal Uzan, Hakan Uzan, Melahat Uzan, and Luna have engaged in most or all of such activities in New York. Accordingly, they are subject to general jurisdiction in New York.

9. Finally, it should be noted that the exercise of long-arm jurisdiction under any and all of the foregoing bases comports with due process.

10. For due process to be satisfied, two requirements must be met. First, defendant must have "certain minimum contacts [with the forum] . . . such that the maintenance of the suit does not offend traditional notions of fair play and substantial justice." *U.S. Titan, Inc.* v. *Guangzhou Zhen Hua Shipping Co.*, 241 F.3d 135, 152 (2d Cir. 2001) (internal quotation marks omitted). Second, "the assertion of personal jurisdiction [must] comport [ ] with traditional notions of fair play and substantial justice—that is, . . . it [must be] reasonable under the circumstances of the particular case." *Bank Brussels Lambert* v. *Fiddler Gonzalez & Rodriguez*, 305 F.3d 120, 129 (2d Cir. 2002) (internal quotation marks omitted).

11. As to the first inquiry, minimum contacts are satisfied for the following reasons: With respect to Kemal Uzan, Hakan Uzan, Melahat Uzan, Luna, and Akay (not to mention Cem Uzan, who concedes personal jurisdiction), plaintiffs have established these defendants' "continuous and systematic" business contacts with the forum. *Helicopteros Nacionales de Colombia, S.A.* v. *Hall*, 466 U.S. 408, 416 (1984). With respect to all these defendants, moreover, plaintiffs have shown that each defendant purposefully availed [him or her self] of the privilege of doing business in the forum and could foresee being haled into court here. *See Bank Brussels Lambert*, 305 F.3d at 127.

12. As to the second inquiry, in assessing reasonableness courts consider four factors: (1) the burden on defendant of defending itself in the forum; (2) the interest of the forum state in adjudicating the controversy; (3) the interest of the plaintiff in obtaining convenient and effective relief; and (4) "the procedural and substantive policies of other nations whose interests are affected by the assertion of jurisdiction by the . . . court." *Asahi Metal Ind. Co.* v. *Superior Ct. of Cal.*, 480 U.S. 102, 113, 115 (1987).

13. Here, these factors all weigh toward the reasonableness of exercising personal jurisdiction in this case. First, the Uzans' vast wealth, the substantial overlap between the individual and corporate defendants, and defendants' extensive participation in this action through the employ of numerous lawyers from several major law firms demonstrate that defendants have more than ample resources to defend themselves in this forum. Second, any decision by this Court to decline jurisdiction would result in a substantial hardship to plaintiffs, whose ability to obtain convenient and effective relief would be substantially impaired. Finally, defendants have not demonstrated a valid competing interest.

14. Accordingly, exercise of long-arm jurisdiction is consistent with due process. Though not necessary to this Court's exercise of personal jurisdiction over defendants, it should also be noted that their fraudulent activities substantially impacted, not only New York, but also Illinois, where MCC is based and whence defendants directed numerous fraudulent emails and telephone calls.

Common Law Fraud

15. To prevail on a claim for common law fraud (or fraudulent misrepresentation) under Illinois Law, a plaintiff must prove the following elements by clear and convincing evidence: (1) a false statement of material fact; (2) known or believed to be false by the party making it; (3) intent to induce the other party to act; (4) action by the other party in justifiable reliance on the truth of the statement; and (5) damage to the other party resulting from such reliance. *City of Chicago* v. *Michigan Beach Housing Cooperative*, 696 N.E.2d 804, 809 (1998), citing *Gerill Corp.* v. *Jack L. Hargrove Builders, Inc.*, 128 Ill.2d 179, 131 Ill. Dec. 155, 538 N.E.2d 530, 536 (1989). *See also Bensdorf & Johnson, Inc.* v. *Northern Telecom Ltd.*, 58 F. Supp. 2d 874, 881 (N.D. Ill. 1999). In contrast to promissory fraud, *infra*, the false statement must concern "existing facts." *Asad* v. *Hartford Life Ins. Co.*, 116 F. Supp. 2d 960, 964 (N.D. Ill. 2000). "A statement that merely expresses an opinion or that relates to future or contingent events, rather than past or present facts, does not constitute an actionable misrepresentation" under common law fraud. *Lefebvre Intergraphics, Inc.* v. *Sanden Machine Ltd.*, 946 F. Supp. 1358, 1364 (N.D. Ill. 1996) (internal quotation marks omitted).

16. MCC has proved by clear and convincing evidence that Hakan Uzan and Cem Uzan, as agents for all the defendants, made numerous false statements of material

existing fact designed to induce MCC to extend each of the loans here in issue. As demonstrated in the Findings of Fact, *supra*, these false representations included, *inter alia*, material false statements regarding the business practices and finances of Telsim, the value and security of the collateral, the uses to which prior loan proceeds had been put, the status of other financing for Telsim, the existence and value of offers to purchase an interest in Telsim, and the status of negotiations with third parties. MCC has also shown that it was justified in relying and that it did in fact rely on these statements, that MCC did not know and could not through reasonable diligence have discovered the falsity of defendants' representations (which, indeed, defendants went to great lengths to conceal), and that MCC would not have extended the loans if it had known the truth.

17. In addition, MCC has proved by clear and convincing evidence that there were material facts peculiarly within the defendants' knowledge that they failed to disclose even though, given their special access and all the other circumstances, they had a duty to do so. Under Illinois law, "failure to disclose material information may be considered a false statement of material fact . . . if the person failing to disclose the information owed a duty to disclose that information." *Lefebvre*, 946 F. Supp. at 1366; *see Coca-Cola Co. Foods Div.* v. *Olmarc Packaging Co.*, 620 F. Supp. 966, 973 (N.D. Ill. 1985); *Tcherepnin* v. *Franz*, 393 F. Supp. 1197, 1217 (N.D. Ill. 1975). These facts included, *inter alia*, the Uzans' already-existing practice of funneling monies from Telsim to other Uzan-controlled entities and the absence of meaningful checks at Telsim to prevent such a practice. Had it known these facts, MCC would not have made any of the loans, since they would have recognized that, as was the case, defendants simply used Telsim as a "front" to fund their overall economic enterprise and line their personal pockets.

Promissory Fraud

18. Even assuming *arguendo* (and contrary to the foregoing conclusions) that not all the aforementioned misrepresentations of present facts served to induce all MCC's loans here in issue (in particular the first one), defendants would still be fully liable to MCC on all the loans because it is beyond reasonable dispute that every one of MCC's loans was induced by promissory fraud.

19. Under Illinois law, a plaintiff can state a claim for fraud based "upon a false representation of intent concerning future conduct," *General Elec. Credit Auto Lease, Inc.* v. *Jankuski*, 532 N.E.2d 361, 363-64 (1988), where "the false promise or representation of intention of future conduct is the scheme or device to accomplish the fraud," *Bower* v. *Jones*, 978 F.2d 1004, 1011 (7th Cir. 1992). Such a scheme exists where "a party makes a promise of performance, not intending to keep the promise but intending for another party to rely on it, and where the other party relies on it to his detriment." *Id.* (internal quotation marks omitted). In addition, "although a single broken promise" is insufficient to constitute promissory fraud, "repeated false promises" by a defendant may give rise to an "actionable scheme." *Zic* v. *Italian Gov't Travel Office*, 149 F. Supp.2d 473, 477 (N.D. Ill. 2001).

20. MCC has proved by clear and convincing evidence that defendants induced each and every one of the loans here in question by repeatedly making material promises to MCC that defendants never intended to fulfill. These included, *inter alia*, representations concerning the uses to which the loan proceeds would be put, the value and security of the collateral that would be provided, the intent to honor the share pledge agreements, the intent to sell an interest in or obtain financing for Telsim, and the intent to provide meaningful financial information to MCC.

21. MCC relied to its detriment on some or all of these promises, which materially induced MCC to make its various loans. Such reliance was justified under all the circumstances, including defendants' concealment of their elaborate and well-developed fraudulent scheme.

Civil Conspiracy

22. Although all the defendants are liable for common law fraud and promissory fraud under ordinary principles of agency, in addition, they are liable jointly and severally, because of their participation in a civil conspiracy to defraud.

23. A civil conspiracy claim "extend[s] liability in tort beyond the active wrongdoer to those who have merely planned, assisted or encouraged the wrongdoer's acts." *Scott* v. *Aldi, Inc.*, 703 N.E.2d 526, 528 (1998). The necessary elements of civil conspiracy under Illinois law are: (1) an agreement between two or more persons; (2) to participate in an unlawful act, or a lawful act in an unlawful manner; (3) resulting in an injury caused by the unlawful act; and (4) a showing that the act was done in furtherance of a common scheme. *See Vance* v. *Chandler*, 597 N.E.2d 233, 236 (1992). The overt act need not itself be tortious or independently actionable in tort to support a cause of action for civil conspiracy. The act need only be overt, *i.e.*, "an outward act done in pursuance and manifestation of an intent or design." *Id.* (quoting *Black's Law Dictionary* 1104 (6th ed. 1990)).

24. Illinois courts rely on circumstantial evidence to infer an agreement among conspiring defendants: "[A] conspiracy is rarely susceptible of direct proof; instead, it is established from circumstantial evidence and inferences drawn from evidence, coupled with commonsense knowledge of the behavior of persons in similar circum-

stances." *Adcock* v. *Brakegate, Ltd.*, 645 N.E.2d 888, 895 (1994).

25. The evidence introduced at trial establishes conclusively that all defendants conspired to defraud MCC in ways previously addressed. While most of the fraudulent representations and promises were made by Hakan Uzan and Cem Uzan, the overall scheme was cleared with Kemal Uzan and implemented with his active participation. Additionally, the record shows that Melahat Uzan, Aysegul Akay, and Luna planned, assisted, and encouraged the wrongdoers in their conspiracy to defraud MCC. All the Uzan defendants had substantial holdings or interests in the enterprise to which the loan proceeds were diverted, and, among other overt acts, Melahat Uzan and Akay signed documents and/or participated in meetings or transfers that diluted plaintiffs' collateral, and Luna played a central role in diverting assets from Telsim to offshore companies for the Uzans' personal benefit. Finally, all defendants received money diverted from Telsim, whether directly or through other Uzan-controlled companies.

Constructive Trust

26. A constructive trust is a flexible equitable remedy designed to prevent unjust enrichment and the like. Although under New York law, it often requires proof of a confidential or fiduciary relationship, a promise, a transfer in reliance on the promise, and unjust enrichment, *see In re Stylesite Marketing, Inc.*, 253 B.R. 503, 508 (Bankr. S.D.N.Y. 2000), one or more of these elements can be relaxed when "property has been acquired in such circumstances that the holder of the legal title may not in good conscience retain the beneficial interest." *Republic of Philippines* v. *Marcos*, 806 F.2d 344, 355 (2d Cir. 1986). "The court reserves the freedom to apply this remedy to whatever knavery human ingenuity can invent. And, a

constructive trust will be erected wherever necessary to satisfy the demands of justice . . . . Its application is limited only by the inventiveness of men who find new ways to enrich themselves unjustly by grasping what should not belong to them." *Id.*

27. Here, through the machinations previously described, defendants have wrongfully converted to their benefit and control most of the value of plaintiffs' promised collateral of approximately 73.5% of Telsim's outstanding shares, approximately 66% of which had been pledged to MCC and 7.5% of which had been pledged to Nokia. As a result of the April 24, 2001 dilution meeting, defendants fraudulently reduced the value of plaintiffs' pledged interest to 24.5% of Telsim's outstanding shares, transferring the difference (49% of Telsim's outstanding shares) to defendant Standart Telekom. Then, through the May, 2002 registration of the January 4, 2002 resolutions, defendants stripped plaintiffs' remaining collateral of its voting, auditing, and management control rights, transferring such rights to Uzan-owned-or-controlled shares. While it cannot be said that the shares remaining under the original collateral are completely worthless, *see* Part I, *supra*, nonetheless the huge diminution in value because of defendants' conversions more than satisfies the requirements for imposing a constructive trust in plaintiffs' favor over the functional equivalent of the value stolen by defendants from plaintiffs' shares, in other words, over Telsim shares, held by any one or more of the entities controlled by the Uzans, that collectively constitute 73.5% of the ownership, control, and share value of Telsim.

Orders of Relief

Based on the foregoing, the Court hereby orders relief in plaintiffs' favor, as follows:

Damages: MCC

1. Where a loan has been fraudulently induced, Illinois law permits (but does not require) the Court to award in damages the full amount of the loan, plus interest. *See Horne* v. *Walton*, 7 N.E. 103, 104 (1886); *Appl[illegible]ion of Busse*, 464 N.E.2d 651, 658-59 (1984); *Commerci[illegible] Nat'l Bank of Peoria* v. *Fed. Deposit Ins. Corp.*, 476 N.E.2d 809, 815 (1985). The borrower bears the burden of providing any reductions, set off, or mitigation. *See Commercial Nat'l Bank of Peoria*, 476 N.E.2d at 813.

2. Here, defendants have hugely and fraudulently heightened the risk borne by MCC in makings its loans, by such means as vastly impairing the value of plaintiffs' security and diverting enormous sums from Telsim's coffers to other Uzan entities and to their own pockets. While defendants through their fraudulent concealment and their failure to provide adequate discovery have made impossible a precise determination of what value, if any, remains in the collateral or what possibility, if any, there is of recovering any payment from Telsim (which has defaulted), it is clear that defendants never intended to have the loans repaid beyond the small sums that they previously paid in order to lull MCC into advancing still greater sums. In such circumstances, the best measure of plaintiff's compensatory damages is that set forth in *Horne*, *i.e.*, the full amount of MCC's outstanding loan plus interest. Moreover, defendants have failed to meet their burden of proving any reductions, set offs, or mitigation of damages and, instead, by their failure to appear at trial, have waived any defenses they might otherwise have had to this measure of compensatory damages.

3. Accordingly, as set forth *supra*, MCC is entitled on its fraud claims, taken jointly and severally, to an award of compensatory damages from the defendants, jointly and severally, in the amount of $1,803,089,316.57 plus interest.

4. As previously calculated, prejudgment interest through July 31, 2003 on the MCC compensatory damages is $329,807,589.09. Thus, MCC is entitled to a compensatory damage award of $2,132,896,905.66 through July 31, 2003.

5. Punitive damages are also available in Illinois fraud cases, "when fraud, actual malice, deliberate violence or oppression accompanies the tort, or when the defendant acts willfully or with such gross negligence as to indicate a wanton disregard of the rights of others." *Parsons* v. *Winter*, 491 N.E.2d 1236, 1241 (1986). "Punitive damages are in the nature of punishment and a warning and example to deter the defendant and others from committing like offenses in the future." *Id. See also, Carter* v. *Mueller*, 457 N.E.2d 1335, 1342 (1983). Here, the evidence establishes beyond question that in defrauding MCC, defendants acted willfully and with actual malice so as to indicate a wanton and deliberate disregard for MCC's rights. An award of punitive damages is therefore appropriate.

6. The Supreme Court has held that in determining the magnitude of punitive damages awards, due process requires that courts take account of three guideposts: (1) the degree of reprehensibility of the tortious conduct; (2) the ratio of punitive damages to compensatory damages; and (3) the difference between this remedy and the civil penalties authorized or imposed in comparable cases. *See BMW of N. Am., Inc.* v. *Gore*, 517 U.S. 559, 575 (1996). Considering the reprehensibility of defendants' conduct in this case, the Court perhaps would be justified in imposing an award of punitive damages several fold the amount of actual damages awarded. *See id.* ("Perhaps the most important indicium of the reasonableness of a punitive damages award is the degree of reprehensibility of the defendant's conduct."). *See also State Farm Mut. Auto. Ins. Co.* v. *Campbell*, 538 U.S. 408, 123 S.Ct. 1513, 1520-21 (2003).

7. Here, however, in light of the large size of the compensatory damages imposed, the Court finds that an award of punitive damages equal in amount to the compensatory damages awarded will be sufficient to achieve the desired deterrent effects. Accordingly, the Court hereby awards MCC the sum of $2,132,896,905.66 in punitive damages, for a total damages award of $4,265,793,811.32 against the defendants, jointly and severally. (Post-judgment interest will also be added, by the Clerk, in the rates automatically provided by federal law).

Constructive Trust: MCC and Nokia

8. As plaintiffs have prevailed on their constructive trust claim relating to the original value of their collateral that defendants stole from them, plaintiffs are hereby converted into the equitable owners of Telsim shares that are the functional equivalent of the original collateral, that is, Telsim shares held by any one or more of the entities controlled by the Uzans that collectively constitute 73.5% of the ownership, control, and share value of Telsim.

9. Defendants are ordered to convey the shares encompassed by the constructive trust to the registry of this Court within one week from entry of judgment for the purposes of execution of judgment.

Permanent Injunction

10. Plaintiffs are also entitled to a judgment of permanent declaratory and injunctive relief. *See, e.g., Caterpillar, Inc.* v. *Jerryco Footwear, Inc.*, 880 F. Supp. 578, 587 (C.D. Ill. 1994) (granting injunction in connection with Illinois fraud claim); *People ex rel. Hartigan* v. *Dynasty Sys. Corp.*, 471 N.E.2d 236 (1984); *Am. Bluefriesveem* v. *Heidl*, 69 F. Supp. 49, 52 (S.D.N.Y. 1946)

(awarding injunctive relief in connection with a constructive trust claim).

11. Accordingly, defendants (jointly and severally, as applicable), and all those acting as their agents or in concert with them, are hereby:

a. Prohibited from taking any other step, directly or indirectly, to certificate, transfer, encumber, or affect in any way whatever the shares of stock over which plaintiffs have been given a constructive trust and/or the value, status, and/or availability of those shares to the plaintiffs, other than to transfer the functional equivalent of the value stolen from plaintiffs' collateral to the registry of this Court, within one week of entry of judgment, in accordance with the foregoing order;

b. Prohibited from exercising the Class A voting rights they purportedly created during the January 4, 2002 meeting of the shareholders of Telsim;

c. Prohibited from transferring any asset of Telsim to a foundation;

d. Prohibited from diverting any revenue derived by or on account of Telsim to any other entity;

e. Prohibited from removing or transferring any assets from Telsim, other than in the ordinary course of business;

f. Directed to take all steps necessary to dissolve the Turkish injunctions collusively procured by defendants beginning on April 19, 2002 purporting to prohibit transfer of the collateral outside of Turkey.

g. Directed to take all steps necessary to withdraw and cause to be dissolved the Turkish injunction granted on November 27, 2002 and the action on which it is premised, and enjoined from initiating any similar proceeding;

h. Barred from effectuating the attachment entered on June 19, 2002 against Motorola Turkey and Motorola Ltd. in connection with the Swiss arbitration and, instead, required to seek its immediate dissolution;

i. Prohibited from engaging in future activities that would result in the diversion of revenue, opportunities or assets from Telsim to any other entity or individual, and are further required to restore to Telsim the full value of any such improperly diverted revenue, opportunities or assets; and

j. Prohibited from bringing, commencing or causing the initiation of proceedings in any foreign court that would interfere with the enforcement of plaintiffs' judgment, and are ordered immediately to withdraw or to cause the withdrawal of any such actions that are now pending.

Contempt Sanctions and Enforcement of Judgment

12. Defendants have already been found to be in contempt of the Court's prior orders regarding the transfer of stock. Since Nokia has no meaningful remedy for the fraud perpetrated upon it other than the constructive trust imposed herein on its behalf, therefore, in light of the defendants' past contempts, if defendants now fail to transfer or cause to be transferred the requisite Telsim shares to the Court's registry on behalf of Nokia within one week from the entry of judgment, the Court hereby orders that judgment will automatically then enter requiring defendants (jointly and severally) to pay to Nokia two times the full amount outstanding on the loans extended by Nokia to Telsim (*i.e.*, $711,000,977.23), plus pre-judgment interest in the amount of $142,706,661.90, for a total of $853,707,639.13) for a grand total of $1,707,415,278.26.

(Post-judgment interest, in accordance with federal law, will be taxed by the Clerk.)

13. Defendants also remain in contempt of the prior orders of the Court to the extent reaffirmed herein. It is also clear from the record of this case that monetary sanctions will not suffice to bring defendants into compliance with this these orders. The Court therefore orders that unless and until defendants purge their contempts, the individual defendants, if found within the jurisdiction of the United States, will be immediately arrested and held in confinement until such time as they comply with the directives of the Court's January 6 and May 9 Orders in so far as they are reincorporated into the orders set forth above. Plaintiffs' counsel shall consult with the U.S. Marshals Service as promptly as possible as to the means of effectuating this order. In addition, the Court hereby grants plaintiffs' request for their attorneys' fees and costs incurred in prosecuting their contempt motion, *see N.Y. State N.O.W.* v. *Terry*, 159 F.3d 86, 96 (2d Cir. 1998), with Magistrate Judge Maas to determine the amount thereof.

14. All the attachment orders previously entered shall remain in place to satisfy the judgment and contempt sanctions entered herein. Among other things, this Court has previously issued certain orders of attachment, pursuant to which, *inter alia*, funds held in bank accounts in the names of companies that the defendants own and/or control, either directly or indirectly, have been attached by the U.S. Marshals Service. At a hearing held on November 25, 2002, defendants objected to such attachments as to non-parties, and the Court directed any affiliated non-parties to file objections to the Court's attachment orders by December 2, 2002. No such objections were filed, and accordingly any such objections have been waived. The Court finds that plaintiffs are entitled to execution of their judgment upon these bank

accounts and all bank accounts that previously have been, or hereunder will be, attached in this action, and/or in any foreign actions ancillary thereto. More generally, because of the Uzans' complete control over more than 130 entities, listed at ¶ 125 of this Opinion, and because plaintiffs have utilized transfer between these controlled entities to avoid creditors, plaintiffs are entitled to collect their judgments not only from the assets owned by any of the defendants directly, but also from the assets of any or all of the entities identified in ¶ 125 above and any other entities defendants own and/or control, directly or indirectly, over each of which defendants exercise complete domination and control and through which domination defendants committed the foregoing frauds against plaintiffs.

The Clerk of the Court is directed to enter final judgment, as promptly as possible, (a) finding defendants liable to MCC on MCC's claims of common law fraud, promissory fraud, and civil conspiracy, and awarding MCC from the defendants, jointly and severally, the sum of $4,265,793,811.32 plus post-judgment interest; (b) finding defendants liable to plaintiffs on plaintiffs' constructive trust claims and directing defendants to transfer from any of the entities controlled by the Uzans to the registry of this Court, within one week of entry of judgment, the Telsim shares that collectively constitute 73.5% of the ownership, control, and share value of Telsim; and (c) imposing the other relief set forth in paragraphs 1-14 of this section.

SO ORDERED.

/s/
JED S. RAKOFF, U.S.D.J.

APPENDIX I

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

No. 02 CIVIL 0666 (JSR)

MOTOROLA CREDIT CORPORATION AND NOKIA CORPORATION, PLAINTIFFS

v.

KEMAL UZAN, ET AL., DEFENDANTS

[Filed: July 31, 2003]

JUDGMENT

The parties having made various motions, and the matter having come before the Honorable Jed S. Rakoff, United States District Judge, and the Court, on July 31, 2003, having rendered its Opinion (88825) and Order directing the Clerk of the Court to enter final judgment, as promptly as possible (a) finding defendants liable to MCC on MCC's claims of common law fraud, promissory fraud, and civil conspiracy, and awarding MCC from the defendants, jointly and severally, the sum of $4,265,793.811.32 plus post-judgment interest; (b) finding defendants liable to plaintiffs on plaintiffs' constructive trust claims and directing defendants to transfer from any of the entities controlled by the Uzans to the registry of this Court, within one week of entry of judgment, the Telsim shares that collectively constitute 73.5% of the ownership, control, and share value of Telsim; and (c) imposing the other relief set forth in

paragraphs 1-14 of the Orders of Relief section of the Opinion (88825) and Order dated July 31, 2003, it is,

ORDERED, ADJUDGED AND DECREED: That for the reasons stated in the Court's Opinion (88825) and Order dated July 31, 2003, final judgment is entered as follows: (a) defendants are found liable to MCC on MCC's claims of common law fraud, promissory fraud, and civil conspiracy, and MCC is awarded from the defendants, jointly and severally, the sum of $4,265,793.811.32 plus post-judgment interest; (b) defendants are found liable to plaintiffs on plaintiffs' constructive trust claims and defendants are directed to transfer from any of the entities controlled by the Uzans to the registry of this Court, within one week of entry of judgment, the Telsim shares that collectively constitute 73.5% of the ownership, control, and share value of Telsim; and (c) the other relief set forth in paragraphs 1-14 of the Orders of Relief section of the Opinion (88825) and Order dated July 31, 2003 are imposed.

Dated: New York, New York
July 31, 2003

J. Michael McMahon
Clerk of Court

BY: /s/
Deputy Clerk

APPENDIX J

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Docket Nos. 02-7566, 02-9302

MOTOROLA CREDIT CORPORATION AND NOKIA CORPORATION, PLAINTIFFS-APPELLEES

v.

KEMAL UZAN, CEM CENGIZ UZAN, MURAT HAKAN UZAN, MALAHAT UZAN, AYSEGUL AKAY, ANTONIO LUNA BETANCOURT, UNIKOM ILETISM HIZMETLERI, STANDART PAZARLAMA A.S. AND STANDART TELEKOMUNIKASYON BILGISAYAR HIZMETLERI A.S., DEFENDANTS-APPELLANTS

Argued: Aug. 5, 2002
Decided: March 7, 2003

Before: JACOBS, CABRANES, and F.I. PARKER, Circuit Judges.

PER CURIAM:

In Docket No. 02-7566, Defendants appeal from the May 9, 2002 preliminary injunction entered in the United States District Court for the Southern District of New York (Rakoff, J.), in aid of Plaintiffs' claims under the Racketeer Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. §§ 1961-1968, and certain Illinois state and common law claims. The plaintiff corporations financed cell-phone and communications networks set up in Turkey by Telsim Mobil Telekomunikasyon Hizmetleri A.S. ("Telsim"), and—

following a series of non-payments and serious concern that the loans would not be repaid—are suing persons who are alleged to control Telsim and its onetime chief stockholder, Rumeli Telefon Sistemleri A.S. ("Rumeli Telefon"), and to have impaired collateral by diluting Telsim stock and other maneuvers. Arbitrations concerning the underlying financing transactions were initiated in Switzerland, and have been stayed by the Southern District of New York.

We conclude that the RICO claims based on a third-party's failure to pay on a debt are unripe. This ruling does not strip the district court of all jurisdiction, but it is likely to require reconsideration by the district court of a number of issues, rulings, and orders—no doubt aided by further proceedings being conducted on the merits. We therefore remand for the district court to dismiss the RICO claims, without prejudice to reassertion at some appropriate later time, and to exercise discretion as to whether to retain supplemental jurisdiction over the state law claims. However, we do not vacate the preliminary injunction.

In Docket No. 02-9302, Defendants appeal orders of the district court denying their motions to compel arbitration, staying three arbitrations pending in Switzerland, and denying Defendants' motion to stay all proceedings and the challenged orders pending arbitration. In light of our decision in 02-7566, we remand the issues in 02-9302 to the district court for reconsideration.

Nostra sponte, we hereby consolidate these appeals.

BACKGROUND

Plaintiff Motorola Credit Corporation ("MCC") is the financing affiliate of Motorola, Inc., which manufactures and services cellular telecommunications systems. Plaintiff Nokia Corporation sells switching technology.

The individual Defendants are several members and one close associate of the prominent Uzan family of Turkey, which controls Telsim, and Rumeli Telefon. Neither Telsim

nor Rumeli Telefon is a party to this action. The Uzans also control Defendants Unikom Iletism Hizmetleri Pazarlama A.S., Standart Pazarlama A.S., and Standart Telekomunikasyon Bilgisayar Hizmetleri A.S. ("Standart Telekom").

In 1998, MCC entered into several overlapping agreements with Telsim and Rumeli Telefon. MCC loaned Telsim $360 million to purchase cellular infrastructure and equipment from Motorola Ltd. (a MCC affiliate), and $200 million to enable Telsim to acquire a 25-year nationwide cellular license. As collateral, Rumeli Telefon—which then owned approximately 73.5% of Telsim—pledged 51% of Telsim's outstanding shares. In subsequent years, MCC provided additional financing—eventually totaling approximately $2 billion—and the pledged interest was increased to 66% of Telsim's outstanding shares.

Each of these agreements provides that it "shall be governed and interpreted in accordance with the internal laws (without regard to the laws of conflicts) of Switzerland," and that any unresolved dispute "aris[ing]" under the agreement shall be decided, to the exclusion of the ordinary courts, by a three-person arbitration panel in Switzerland in accordance with the International Arbitration Rules of the Zurich Chamber of Commerce.

Also in 1998, Nokia entered into a smaller but similar arrangement with Telsim and Rumeli Telefon. The initial loan was extended by Nokia's bank, ABN-Amro, backed by the credit of Nokia. As security, Rumeli Telefon pledged 5% of Telsim's outstanding shares. In subsequent years, Nokia extended additional financing to Telsim, approximately $800 million in all, and Rumeli Telefon increased the pledged interest to 7.5% of Telsim's outstanding shares.

Each of these agreements provides that it "shall be governed by, and shall be construed in accordance with Swiss law," and that all disputes "relating to" the agreement shall be resolved by a three-member arbitration

panel in Switzerland in accordance with the International Arbitration Rules of the Zurich Chamber of Commerce.

Of these colossal loans from MCC and Nokia, Telsim has repaid approximately $200 million since 1998, and only $5 million since mid-2000.

A special shareholders meeting of Telsim was convened on April 24, 2001. MCC and Nokia contend that it was convened for the purpose of devaluing the pledges of Telsim shares. Defendants contend that the purpose was to protect against a feared loss of control over Telsim. In any event, the shareholders at the meeting tripled the number of outstanding Telsim shares. Although current shareholders were afforded preemption rights to purchase the newly issued shares, Rumeli Telefon (the largest shareholder) waived these rights, and they were transferred to Defendant Standart Telekom (another Uzan-controlled company), which exercised them. Partly as a result of this transfer,[1] Standart Telekom raised its stake in Telsim from 0.32% to 66.48%, while Rumeli Telefon's holding (all of which was pledged to MCC and Nokia) was reduced to 24.54%—severely diluting the value of Plaintiffs' collateral.

Plaintiffs presented additional evidence of the Defendants' maneuvers. For example, the Defendants attempted to alter the voting rights of Telsim's outstanding shares in a way that would have reduced the voting power of the pledged shares and thereby further impaired the collateral. Defendants also allegedly caused false criminal charges to be initiated in Turkey against MCC and Nokia executives, on the claimed grounds that the executives had made "explicit and armed threats" against the Uzans to kill, blackmail, and abduct them, and offered to drop the charges if Plaintiffs deferred payment on the outstanding loans. Defendants also diverted revenue and assets away from Telsim.

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[1] *See infra* note 5.

Plaintiffs contend that the Defendants' activities throughout this period were intended to thwart Plaintiffs' ability to foreclose on the loans and exercise their rights with respect to the pledged interest.

Before this lawsuit was filed, ABN-Amro began an arbitration against Telsim in Switzerland. In this arbitration, Telsim attempted to reschedule its repayments based on a theory of "economic force majeure." Shortly after this lawsuit was filed, Telsim began an arbitration proceeding in Switzerland against MCC in which Telsim also invoked "economic force majeure" in an effort to reschedule its repayments. On June 7, 2002, Rumeli Telefon commenced two arbitrations against the Plaintiffs in Switzerland, seeking damages and Plaintiffs' compelled consent to the deposit of the pledged Telsim shares with the arbitral forum. On October 15, 2002, the district court issued an opinion granting Plaintiffs' motion to stay the Swiss arbitrations initiated by Telsim and Rumeli Telefon. That stay is among the rulings challenged on the appeal in Docket No. 02-9302, and subject to remand.[2]

In the complaint in the Southern District of New York, both Plaintiffs alleged violations of RICO (Counts I-IV), and sought the imposition of a constructive trust or equitable lien (Count XII). In addition, MCC alleged Illinois state and common law claims (Counts V-VII, XI), and violations of the Computer Fraud and Abuse Act, 18 U.S.C. § 1030(a)(4) (Count VIII), and the Electronic Communications Privacy Act, 18 U.S.C. §§ 2511(1)(a), 2701(a)(2) (Counts IX-X).

On May 9, 2002, following a six-day evidentiary hearing, the district court granted the Plaintiffs' motion for a preliminary injunction, which (*inter alia*) directs the

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[2] The three Swiss arbitrations that the district court stayed are between and among entities that are party to contractual arbitration agreements, but that are not all present in this lawsuit.

Defendants "to deposit into the [district court's] registry . . . the shares of stock of Telsim . . . held by defendant Standart [Telekom] . . . and issued to Standart [Telekom] during a meeting of Telsim shareholders on April 24, 2001, comprising at least 73.5% of the shares of Telsim stock currently outstanding." On May 21, 2002, the district court stated its reasons for that order. *Motorola Credit Corp.* v. *Uzan*, 202 F. Supp. 2d 239 (S.D.N.Y. 2002). The district court concluded (insofar as the opinion bears on this appeal) that (1) injunctive relief is available to a private plaintiff bringing a civil action under RICO; (2) Plaintiffs demonstrated a sufficient likelihood of success on the merits of their RICO claims; (3) Plaintiffs had standing to bring their RICO claims against Defendants regardless of whether they pursued remedies against Telsim; (4) MCC was independently entitled to injunctive relief under the Illinois state and common law claims; and (5) the arbitration provisions in the various agreements did not divest the court of jurisdiction. Defendants now appeal.

DISCUSSION

This case raises a host of unusual questions, and the answers have enormous consequences to the parties and non-parties alike. Today, however, we focus on a single issue that was incorrectly decided by the district court, and that may have impact on many issues confided to the discretion of the district court.

"We review a district court's decision to grant . . . a preliminary injunction for abuse of discretion." *Int'l Bhd. of Teamsters* v. *Local Union No. 810*, 19 F.3d 786, 789 (2d Cir. 1994). "Abuse of discretion usually consists of clearly erroneous findings of fact or the application of an incorrect legal standard." *Id.* To obtain a preliminary injunction, a plaintiff must show "a threat of irreparable injury and either (1) a probability of success on the merits or (2) sufficiently serious questions going to the merits of the

claims to make them a fair ground of litigation, and a balance of hardships tipping decidedly in favor of the moving party." *Time Warner Cable* v. *Bloomberg L.P.*, 118 F.3d 917, 923 (2d Cir. 1997).[3]

The district court determined that Plaintiffs "are substantially likely to succeed on their RICO claim under Count III." *Motorola*, 202 F. Supp. 2d at 248. Necessary to this determination was the court's conclusion that Plaintiffs had standing to bring their RICO claims and to seek injunctive relief based on those claims. We conclude that, under *First Nationwide Bank* v. *Gelt Funding Corp.*, 27 F.3d 763, 768 (2d Cir. 1994), the Plaintiffs lack statutory standing under RICO because their claims are unripe. Although the district court determined that MCC is also entitled to the preliminary injunction based on its Illinois state and common law claims, the dismissal of the RICO claims has potential bearing on the district court's exercise of supplemental jurisdiction over the non-federal claims. We therefore remand for the district court to decide, under 28 U.S.C. § 1367(c), whether it will retain jurisdiction over the state law claims.

Under RICO, "[a]ny person injured in his business or property by reason of a violation of section 1962 of this chapter may sue therefor in any appropriate United States district court." 18 U.S.C. § 1964(c). To satisfy RICO's standing requirements, a plaintiff must demonstrate, "(1) a violation of section 1962; (2) injury to business or property; and (3) causation of the injury by the violation." *Hecht* v. *Commerce Clearing House, Inc.*, 897 F.2d 21, 23 (2d Cir.

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[3] It is said that a plaintiff who seeks a "mandatory" injunction, rather than a "prohibitory" injunction, must demonstrate a "clear" or "substantial" likelihood of success. *Beal* v. *Stern*, 184 F.3d 117, 122-23 (2d Cir. 1999). The district court expressed doubts that MCC and Nokia were seeking mandatory injunctive relief (not often an easy distinction to draw), but concluded that the heightened standard would be satisfied if triggered.

1990). In *First Nationwide*, this Court considered a bank's RICO claim arising out of fraudulently induced loans. We held that "to the extent [the bank's] complaint is predicated on loans that have not been foreclosed, its claims are not ripe for adjudication because it is uncertain whether [the bank] will sustain any injury cognizable under RICO." *First Nationwide*, 27 F.3d at 767.

Our holding in *First Nationwide* rested on the general principle that "a cause of action does not accrue under RICO until the amount of damages becomes clear and definite." *Id.* at 768. The "clear and definite" amount of damages suffered by a secured creditor who is fraudulently induced to make a loan and seeks to recover the value of the loan itself, "cannot be established until it is finally determined whether the collateral is insufficient to make the plaintiff whole, and if so, by how much." *Id.* That is because the RICO damages are netted against recovery obtained from collateral and other sources:

> Because the fraud defendant is not liable for all losses that may occur, but only for those actually suffered, only after the lender has exhausted the bargained-for remedies available to it can the lender assert that it was damaged by the fraud, and then only to the extent of the deficiency.

Id. In short, "a plaintiff who claims that a debt is uncollectible because of the defendant's conduct can only pursue the RICO treble damages remedy after his contractual rights to payment have been frustrated." *Id.* We therefore concluded that until the secured creditor foreclosed on the loans, the creditor's claims were not ripe for suit. *Id.* at 769.

It is undisputed that Plaintiffs have not foreclosed on the loans at issue here, and that arbitrations are pending in Switzerland that concern the same underlying transactions.

The district court undertook to distinguish *First Nationwide* in the following terms:

> In *First Nationwide*, . . . the plaintiff sought to bring a RICO claim against the very borrower on whose collateral the plaintiff had not yet fully foreclosed and as to whom ordinary collection proceedings were far from completed. Here, by contrast, the borrower (Telsim) is not a party at all, and the named defendants, who are accused, *inter alia*, of fraudulently inducing the plaintiffs to extend the $2.7 billion in loans and of diverting it to their benefit, are independently liable for this known and certain sum, regardless of whether plaintiffs pursue their alternative remedies against Telsim or not.

Motorola, 202 F. Supp. 2d at 249.

We think that this distinction is invalid. True, the borrower (Telsim) is not a party here, and this is not a contract action. It is likewise true that the present claims are alleged under a wholly distinct theory (fraud) that would render Defendants liable independently of Telsim. But the RICO damages sought are in respect of a loss that would be abated to the extent that: Plaintiffs realize value on the collateral; Plaintiffs recover in the Swiss arbitrations; or the size of the debt on the underlying contracts, or the obligation to pay it, is affected by any ruling on Telsim's defenses in the Swiss arbitration that is binding and enforceable. These contingencies, and other conceivable contingencies, remain. "[T]he fraud defendant is not liable for all losses that may occur, but only for those *actually suffered*." *First Nationwide*, 27 F.3d at 768 (emphases added). Therefore, "the loss" suffered on past-due loans as to which Plaintiffs have "not finally foreclosed cannot yet be determined. Only when [Plaintiffs'] actual loss becomes clear and definite will the claims be ripe for suit. Until that time, [Plaintiffs] lack [ ] standing under RICO to assert claims as to those loans." *Id.* at 769.

The district court's reliance on *GICC Capital Corp.* v. *Technology Finance Group, Inc.*, 30 F.3d 289 (2d Cir. 1994), and *In re Merrill Lynch Partnerships Litigation*, 154 F.3d 56 (2d Cir. 1998), is misplaced. The plaintiff in each case was unsecured, so there was no collateral on which to foreclose, or any other contractual remedy. As we stated in *In re Merrill Lynch*:

> *First Nationwide* [is] inapplicable in this case. [It] hold[s] that when a creditor alleges he has been defrauded RICO injury is speculative when contractual or other legal remedies remain which hold out a real possibility that the debt, and therefore the injury, may be eliminated or significantly reduced. The RICO claim is, thus, not ripe until those remedies are exhausted and the damages are clear . . . . As investors have no contractual or other legal remedies which could assuage the injury [in this case], the amount of damages was "clear and definite," and the injury was ripe, at the time of investment.

In re Merrill Lynch, 154 F.3d at 59. Moreover, the issue in *GICC Capital* was whether the plaintiff had established proximate cause so as to satisfy RICO standing, 30 F.3d at 292, and the discussion of RICO injury in *In re Merrill Lynch* pertained to a statute-of-limitations issue, 154 F.3d at 58-59. In any event, neither case impairs the rule enunciated in *First Nationwide*.

It may be that the arbitration is a forlorn hope for MCC and Nokia, and that, in any event, the collateral will yield little of value. But the arbitration does not cease to be a possible influence (negotiated by contract) on the amount of loss simply because the district court has stayed it. Certainly, the district court cannot in that way force the RICO claim to ripen.

Because Plaintiffs lack RICO standing to assert claims based on a Telsim's failure to pay on a debt, those claims

must be dismissed, without prejudice to reassertion at some appropriate later time. This dismissal also implicates the district court's subject matter jurisdiction. In *Lerner* v. *Fleet Bank, N.A.*, 318 F.3d 113 (2d Cir. 2003), we recently explained that a plaintiff's "lack of statutory standing [under RICO] does not divest the district court of original jurisdiction." *Id.* at 129. Thus, although the plaintiffs' RICO claims in that case were properly dismissed, "[t]he district court had original jurisdiction to support the exercise of supplemental jurisdiction over the . . . plaintiffs' state-law claims." *Id.* We then vacated the district court's dismissal of the plaintiffs' state law claims for lack of jurisdiction, and remanded for a determination of whether to exercise supplemental jurisdiction.

We recognize that the district court has already exercised supplemental jurisdiction over MCC's state law claims, and referenced those claims as additional support for the injunction. However, the dismissal of the RICO claims alters things in a way that justifies reconsideration of the injunction, the sufficiency of grounds for issuance as well as the terms of an injunction, if issued. Among other considerations, the sole remaining federal claims are minor compared to the now-dismissed RICO claims, both in terms of scope and in terms of relief.

In light of this changed landscape, we remand this case to the district court for it to decide whether to retain supplemental jurisdiction over the state law claims pursuant to 28 U.S.C. § 1367(c). Given the district court's conclusion (which we do not now address) that, with respect to MCC, the state law claims provide an independent basis for the preliminary injunction, we do not vacate the preliminary injunction; but our ruling is without prejudice

to any ruling we may make on any relief (or denial of relief) that results from ongoing additional proceedings.[4]

While the mandate of this Court leaves the injunction intact, the issuance of the mandate naturally ends the November 27, 2002 Order of this Court staying the imposition and accrual of fines against the Defendants for non-compliance. However, the schedule of fines established by the district court has long passed, and the district court may (if it determines that the injunction should continue) establish a new, prospective schedule for enforcing compliance.

We note, however, that there appears to be a problem with a term of the present injunction. The injunction directs the Defendants "to deposit into the [district court's] registry . . . the shares of stock of Telsim ... held by defendant Standart [Telekom] ... and issued to Standart [Telekom] during a meeting of Telsim shareholders on April 24, 2001, comprising at least 73.5% of the shares of Telsim stock currently outstanding." It would be impossible for Standart Telekom to comply with this order because, as far as the record shows, Standart Telekom only has 66.48% of the currently outstanding Telsim stock. Moreover, of the Telsim stock Standart Telekom does own,

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[4] Nokia did not join in alleging all of MCC's state law causes of action. However, Nokia's allegation of a Constructive Trust/Equitable Lien cause of action (it is unclear whether that claim is based on Illinois or New York law) might provide an alternative basis for upholding the preliminary injunction in aid of Nokia. *See, e.g., Hurst* v. *Papierz*, 306 N.E.2d 532, 537-38 (1973); *Rolnick* v. *Rolnick*, 35 Misc.2d 456, 230 N.Y.S.2d 789, 791 (N.Y. Sup. Ct. 1962). We intimate no view as to the viability of the constructive trust or any other claim. It is for the district court to determine, in the first instance, whether Nokia's remaining claims provide a sufficient basis to support the preliminary injunction. Therefore, we also remand, but do not vacate, the portion of the preliminary injunction sought by Nokia.

only a portion of it (49% of the currently outstanding shares[5]) is traceable to Rumeli Telefon's preemptive rights and, correspondingly, to the stock pledged to the Plaintiffs. The rest of Standart Telekom's Telsim stock was either owned by Standart Telekom prior to the April 24, 2001 meeting, or acquired by exercising the preemptive rights of Telsim stockholders other than Rumeli Telefon.

The preliminary injunction cannot directly reach the Telsim stock still owned by Rumeli Telefon because Rumeli Telefon is not a party to this litigation. Moreover, so far as we can tell from the record, Rumeli Telefon still owns 24.5% of the currently outstanding Telsim stock. Those shares remain subject to the pledge and potentially subject to foreclosure by the Plaintiffs. Additionally, the district court's opinion does not explain the basis for including within the ambit of the preliminary injunction the Telsim shares owned by Standart Telekom that are not traceable to the Rumeli Telefon preemptive rights. To the extent Standart Telekom acquired these shares by exercising the preemptive rights of Uzan-controlled companies other than Rumeli Telefon, it might be appropriate—although we express no view on the viability of this position—for the preliminary injunction to include those shares if, for example, it could be shown that Standart Telekom's

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[5] It appears to us that, prior to the shareholders meeting on April 24, 2001, Rumeli Telefon owned approximately 73.5% of the outstanding Telsim stock. At that meeting, the total available shares of Telsim stock were tripled, and Rumeli Telefon was given preemptive rights that would have allowed it to maintain its 73.5% ownership of Telsim. Because Rumeli Telefon declined to exercise those rights (it transferred them to Standart Telekom), its stake in Telsim dropped from 73.5% of all outstanding shares to 24.5% of all outstanding shares. Therefore, Rumeli Telefon gave Standart Telekom preemptive rights that allowed Standart Telekom to acquire 49% of the outstanding shares of Telsim (the difference between the 73.5% to which Rumeli was entitled and the 24.5% it ended up with).

acquisition of those shares was part of the fraud. As yet no findings suggest that there has been any such showing. Therefore, although we leave the preliminary injunction in place, we caution that this is an issue to be addressed if, on remand, the court decides to keep the preliminary injunction in place.

We intimate no opinion on any other issues raised in this appeal. The parties may make appropriate motions following the district court's decisions on remand.

CONCLUSION

For the foregoing reasons, we remand in 02-7566 for the district court to dismiss, without prejudice, Plaintiffs' RICO claims based on Telsim's failure to pay on its debt, and to decide whether to retain supplemental jurisdiction over the state law claims. In light of this disposition, we remand for reconsideration all issues raised on the appeal in 02-9302. The court may conduct any proceedings not inconsistent with this opinion. In light of these holdings, we deny, as moot, the following motions pending in 02-9302: 1) Plaintiffs' motion to dismiss the appeal; 2) Defendants' motion for a stay of all proceedings in the district court pending appeal; and 3) Defendants' motion for an expedited appeal. Each party will bear its own costs of this appeal.

The mandate shall issue forthwith.

APPENDIX K

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

No. 02 CIV. 666 (JSR)

MOTOROLA CREDIT CORPORATION AND NOKIA CORPORATION, PLAINTIFFS

v.

KEMAL UZAN, ET AL., DEFENDANTS

Oct. 28, 2002

MEMORANDUM ORDER

JED S. RAKOFF, U.S.D.J.

By orders dated September 30, 2002 and October 15, 2002, the Court denied defendants' motion to compel arbitration and granted plaintiffs' motions to enjoin defendants from taking any actions to further three of four arbitrations commenced in Switzerland following the filing of this lawsuit (the fourth arbitration being largely irrelevant to this lawsuit). Defendants now move to stay, not just the injunction against their furthering the three arbitrations, but this entire lawsuit, pending their appeal of the September 30 and October 15 orders. While, as plaintiffs argue, the relief defendants here seek may well have been waived, *see PPG Indus.* v. *Webster Auto Parts Inc.*, 128 F.3d 103, 107 (2d Cir. 1997), the Court, reaching the merits, denies the stay.

Although defendants primarily seek the stay pursuant to Section 16 of the Federal Arbitration Act, 9 U.S.C. § 1 *et seq.* (providing for interlocutory appeal of denial of motion to compel arbitration), that statute has no application where, as here, none of the moving defendants is a party to the arbitrations in question. *See EEOC* v. *Waffle House*, 534 U.S. 269, 293 (2002). Put another way, for this reason alone the appeal is frivolous, and the motion must be denied. The fact that, as the Court has previously found, defendants here are using their control of the entity that initiated the arbitration (Telsim) to try to derail this lawsuit does not confer on defendants rights to an arbitration agreement to which they themselves are not parties.

Indeed, even assuming *arguendo* that Section 16 were applicable, the moving defendants, as the Court previously determined, caused Telsim to commence the three arbitrations here in question simply "in an effort to undercut the prior orders of, and proceedings before, this Court." October 15 Order at 7. In such circumstances, a stay would only serve to advance the very machinations for which defendants have previously been found in contempt of court. As the Court noted in *Cendant Corp.* v. *Forbes*, 72 F. Supp.2d 341 (S.D.N.Y. 1999), even where Section 16 otherwise applies, a district court "retains discretion to deny . . . a stay in at least those circumstances where the appeal is patently frivolous or taken for an obviously improper purpose." *Id.* at 343. *See also, e.g., Weiner* v. *Gutfreund* (In *re Salmon, Inc. Shareholders' Derivative Litig.*), 68 F.3d 554, 557 (2d Cir. 1995); *Satcom Int'l Group PLC* v. *Orbcomm Int'l Partners, L.P.*, 55 F. Supp.2d 231, 236 (S.D.N.Y. 1999) (stay should be denied "where a party is clearly abusing the right to appeal in order to avoid proceeding before the district court").

Finally, to the extent that defendants seek a stay, not pursuant to the Federal Arbitration Act, but pursuant to

the Court's equitable powers, the Court, for the foregoing reasons, finds such application meritless.

Accordingly, defendants' motion for a stay is hereby denied in all respects.

SO ORDERED.

/s/
JED S. RAKOFF, U.S.D.J.

APPENDIX L

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

No. 02 CIV. 666 (JSR)

MOTOROLA CREDIT CORPORATION AND NOKIA CORPORATION, PLAINTIFFS

v.

KEMAL UZAN, ET AL., DEFENDANTS

October 15, 2002

MEMORANDUM ORDER

JED S. RAKOFF, U.S.D.J.

This Memorandum Order will set forth the reasons for the determinations recited in the Court's Order dated September 30, 2002 ("September 30 Order") and serve to confirm and implement that Order.

First, the September 30 Order denied defendants' motion to dismiss the complaint for insufficient service of process, lack of personal jurisdiction, failure to join indispensable parties, and forum non conveniens. While the Court has considered, and rejected, each of the arguments raised by defendants in support of that motion, a few of the more salient considerations are as follows:

With regard to service of process, the fact that the Racketeer Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. §§ 1961 *et seq.* (pursuant to which the

primary claims here are brought) provides for nationwide service of process in certain circumstances, *see id.* at § 1965, in no way suggests a Congressional intent to preclude in RICO cases extraterritorial service of process to the extent ordinarily available under Rules 4(f) and 4(h), Fed. R. Civ. P. Here, all the defendants were properly served, in a manner comporting with those rules, pursuant to the Hague Convention. *See* O'Connor Decl., Ex. 28; transcript of July 23, 2002 hearing at 53; *see also, Salomon Bros., Inc.* v. *Huitong Int'l Trust & Inv. Corp.*, No. 94 Civ. 8559, 1997 WL 324051, at *2 (S.D.N.Y. June 13, 1997).

With regard to personal jurisdiction, § 302(a) of the N.Y.C.P.L.R. provides, *inter alia*, for long-arm jurisdiction over any non-domiciliary who commits a tortious act within the state either in person or "through an agent." Here, the Court has already found, in connection with granting preliminary injunctive relief, that plaintiffs have made a substantial showing that all the defendants were engaged in a common conspiracy to carry out numerous tortious acts, *see* Opinion dated May 21, 2002 ("May 21 Opinion"), and thus were agents of each other for these purposes. As exemplified by the allegedly fraudulent e-mail sent from defendant Hakan Uzan in New York to Ed Hughes of Motorola Credit Corporation ("Motorola") on December 27, 1999 (which figured prominently in the preliminary injunction hearing), various of the defendants utilized their residences in New York as a base from which to commit one or more tortious acts. Given the joint conspiracy, this is more than sufficient to subject all the defendants to personal jurisdiction in New York pursuant to § 302(a). *See, e.g., Best Cellars, Inc.* v. *Grape Finds at Dupont, Inc.*, 90 F. Supp. 2d 431, 446 (S.D.N.Y. 2000); *Chrysler Capital Corp.* v. *Century Power Corp.*, 778 F. Supp. 1260, 1266 (S.D.N.Y. 1991). Nor is there any due process concern, given that most, if not all, the individual defendants maintain residences in New York, hold New York driver's licenses,

and, in the case of the two most important figures, Hakan Uzan and Cem Uzan, have either utilized New York courts to sue as a resident (Hakan) or have already conceded jurisdiction in this case (Cem). *See generally, Asahi Metal Ind. Co.* v. *Superior Court of Cal.*, 480 U.S. 102, 113-115, 107 S.Ct. 1026, 94 L.Ed.2d 92 (1987) (defining standards for assessing the twin due process requirements of minimum contacts and reasonableness).

With regard to indispensable parties, the Court previously rejected, in its May 21 Opinion at 25, the primary arguments here advanced by defendants that Telsim Mobil Telekomunikasyon Hizmetleri A.S. ("Telsim") and Rumeli Telefon Sistemleri A.S. ("Rumeli Telefon") are necessary and indispensable parties to these proceedings. Since then, defendants' arguments to this effect have, if anything, grown weaker. For example, given defendants' recent offer (accepted by the Court in its Order dated October 3, 2002) to partially purge their contempt by causing Telsim to amend its Articles of Incorporation, there is no remaining doubt that the instant defendants fully control Telsim and its corporate shareholder Rumeli Telefon sufficiently to protect those companies' interests here. Nor, in view of the effective stay of the Swiss arbitrations (*see infra*), is there any remaining material possibility that Telsim and Rumeli Telefon will be subjected to "inconsistent" obligations as a result of their presence in the Swiss arbitrations but absence here. Finally, even if (contrary to fact) Telsim and Rumeli Telefon were necessary parties here, defendants have utterly failed to show that these companies are "indispensable" parties under Rule 19, Fed. R. Civ. P., since, among other defects, defendants have failed to show why, given their control of these two companies, both companies could not be made parties to this litigation if defendants so desired. *See* Fed. R. Civ. P. 19(b) (absent party not indispensable unless it "cannot be made a party").

With regard to forum non conveniens, defendants have likewise failed to carry their burden of rebutting the normally strong presumption favoring a plaintiff's chosen forum. *See Aguinda v. Texaco, Inc.*, 303 F.3d 470, 476 (2d Cir. 2002). Indeed, given the individual defendants' substantial ties to New York, and the uniquely American legal aspects of a RICO action, this prong of defendants' motion borders on the frivolous. *See generally Piper Aircraft Co.* v. *Reyno*, 454 U.S. 235, 254 (1981) (discussing factors).

Second, the September 30 Order denied defendants' motion to dismiss the complaint for lack of subject matter jurisdiction and for failure to state a claim, except as to plaintiffs' eighth claim, which the Court dismissed. So far as the motion is directed against the RICO claims, many of the arguments defendants here make—such as objections to plaintiffs' standing to bring such claims and objections to the adequacy of the pleading of the RICO pattern, enterprise, and predicate acts—were previously rejected, expressly or by necessary implication, in the Court's May 21 Opinion. With respect to arguments not previously ruled upon, only a few merit mention here:

With regard to the extraterritorial application of RICO, the complaint sets forth literally hundreds of predicate acts of mail fraud and wire fraud occurring in the United States, not to mention wire transfers from New York involving at least $450 million in fraudulently obtained funds. This is more than sufficient to warrant application of RICO to the international frauds here alleged. *See, e.g., Johnson Elec. N. Am., Inc.* v. *Mabuchi Motor Am. Corp.*, 98 F. Supp. 2d 480, 485 (S.D.N.Y. 2000); *C.A. Westel de Venezuela* v. *AT & T Co.*, No. 90 Civ. 6665, 1992 WL 209641, *17 (S.D.N.Y. Aug. 17, 1992).

With regard to the RICO claims under §§ 1962(a) and 1962(b), while these claims may present proof problems absent from the claims under §§ 1962(c) and 1962(d) (which

were expressly or implicitly found to be adequate in the May 21 Opinion), the pleadings adequately allege the requisite investment and acquisition injuries sufficiently to survive a motion to dismiss. *See* Complaint, ¶¶ 14, 28-35, 126-37, 144-51, 157-64, 182-235, 241-42, 264-65.

With regard to plaintiffs' "computer hacking" claims, while oral argument suggests that several of these claims may not escape summary judgment, all of the claims, when read most favorably to plaintiffs, escape dismissal under Fed.R.Civ.P. 12(b)(6) except for plaintiffs' eighth cause of action against Cem Uzan and Hakan Uzan for fraudulent use of a computer under 18 U.S.C. § 1030(a)(4). Defendants properly note that plaintiffs' Complaint fails to allege the requisite $5,000 in damages required to maintain a civil action under § 1030(5)(B)(i) and, accordingly, this claim must be dismissed, without prejudice, however, to being repled in the form annexed to Motorola counsel's letter of August 7, 2002.

Third, the September 30 Order denied defendants' motion to compel plaintiffs to submit their instant claims to arbitration as part of two subsequently commenced but now ongoing arbitrations (discussed further below) between, respectively, Telsim and Motorola (with respect to plaintiff Motorola's claims) and Telsim and ABN-AMRO Bank, N.V. (with respect to plaintiff Nokia's claims). The Court previously rejected this same application in its May 21 Opinion at 22-23, and here adds only that it is now reasonably clear from the parties' submissions that Swiss law discourages, if not prohibits, the joinder of non-parties to an arbitration. Here, none of the defendants is party to the underlying arbitration agreements. While the defendants may now find it in their interests to "consent" to being added as parties to the arbitrations, such consent can not be effected unilaterally, especially where, as here, it is being employed simply as a way of avoiding an otherwise valid proceeding in this Court. Conversely, nothing in

Motorola's or ABN-AMRO's agreements to arbitrate contractual disputes arising from their respective financing agreements with Telsim can reasonably be read to constitute an agreement to arbitrate with Telsim plaintiffs' tort allegations that the persons and entities that ultimately controlled Telsim (*i.e.*, the defendants here) siphoned Telsim's loan proceeds to defendants' own benefit and otherwise defrauded plaintiffs.

Fourth, the September 30 Order granted in part and denied in part plaintiffs' motion to stay or otherwise enjoin defendants from further pursuing the aforementioned, and two other, arbitrations. Specifically, the arbitrations that plaintiffs seek to stay are: (1) an arbitration filed in Switzerland by Telsim against Motorola on February 5, 2002 (*i.e.*, well after the filing of the instant action) seeking to excuse, on grounds of "economic force majeure," Telsim's contractual default of its obligations to repay Motorola's loans; (2) an arbitration filed in Switzerland by Rumeli Telefon against Motorola on June 7, 2002 seeking, *inter alia*, to facilitate the transfer to the control of the Swiss arbitrators of the same Telsim stock that this Court had previously ordered transferred to the registry of this Court; (3) an arbitration, parallel to # 2 and likewise filed in Switzerland by Rumeli Telefon on June 7, 2002, seeking parallel relief with respect to the Telsim stock pledged to ABN AMRO Bank (Nokia's intermediary), which this Court had likewise already ordered transferred to this Court's registry; and (4) an arbitration filed on June 10, 2002 in Paris (before the International Chamber of Commerce) by Telsim against two Motorola affiliates—Motorola Limited and Motorola Turkey—alleging breach of certain warranties given with respect to Motorola equipment supplied to Telsim.

As to the first three arbitrations, it is painfully obvious that they were commenced in an effort to undercut the prior orders of, and proceedings before, this Court. The

two arbitrations filed June 7 are particularly egregious, since they were filed, not only in defiance of this Court's order to transfer the Telsim stock to the registry of this Court, but also at the very time that defendants were telling this Court that, because of various Turkish court orders (later found by this Court to likely be the product of defendants' collusive behavior), they could not transfer any Telsim stock out of Turkey. As for the February 5 arbitration, it sought to place before the Swiss arbitrators the determination of what is, in fact, one of defendants' primary defenses on the merits to the instant lawsuit and thereby to disrupt the instant proceedings (firmly scheduled for trial on February 10, 2003) as well as to raise the specter of piecemeal and inconsistent litigation.

While plaintiffs argue that, under such circumstances, this Court has power under the All Writs Act, 28 U.S.C. § 1651, to stay these three arbitrations directly, the Court need not reach that issue, since it has already found—and defendants no longer genuinely dispute, if they ever did—that the instant defendants have complete power to control Telsim and Rumeli Telefon and that plaintiffs are substantially likely to prevail on their instant claims against all defendants. *See* May 21 Opinion. Moreover, it is clear from the foregoing that plaintiffs will suffer irreparable injury if the three Swiss arbitrations proceed. Accordingly, pursuant to Rule 65, Fed. R. Civ. P., the defendants here are hereby immediately ordered to restore and maintain the status quo ante by taking all steps necessary to place the Swiss arbitrations on hold and not to allow Telsim or Rumeli Telefon or their agents or attorneys to pursue those arbitrations in any respect, pending further order of this Court.

The Paris arbitration, however, stands on a different footing. Whether or not Motorola's equipment was defective (as defendants assert and plaintiffs deny), even defendants do not seriously maintain that such alleged

defects materially excused Telsim from repayment of its debts to Motorola (let alone Nokia), nor, obviously, could it have excused any of the fraud alleged by plaintiffs. While not wholly irrelevant to the instant proceedings, therefore, the issue of the alleged equipment defects is a collateral issue of minor consequence to the instant litigation. Accordingly, the Court declines to take any action with respect to that arbitration, at least at this time.

For the foregoing reasons, the Court hereby reaffirms its September 30 Order, the injunctive provisions of which as here elaborated will hereby take effect forthwith.

SO ORDERED.

/s/
JED S. RAKOFF, U.S.D.J.

APPENDIX M

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

No. 02 CIV. 666 (JSR)

MOTOROLA CREDIT CORPORATION AND NOKIA CORPORATION, PLAINTIFFS

v.

KEMAL UZAN, CEM CENGIZ UZAN, MARAT HAKAN UZAN, MELAHAT UZAN, AYSEGUL AKAY, ANTONIO LUNA BETANCOURT, UNIKOM ILETISM HIZMETLERI PAZARLAMA A.S., STANDART PAZARLAMA A.S., AND STANDART TELEKOMUNIKASYON BILGISAYAR HIZMETLERI A.S., DEFENDANTS

May 20, 2002

OPINION

JED S. RAKOFF, U.S.D.J.

When business deals go sour, both sides are apt to cry "fraud," and courts know better than to take such claims at face value. But here we have the unusual case where every preliminary indication is that the defendants, behind a facade of legitimacy, engaged in repeated acts of fraud and chicanery, and thereby perpetrated, and continue to perpetrate, a rather massive swindle.

Plaintiffs Motorola Credit Corporation ("Motorola") and Nokia Corporation ("Nokia") are large, multinational

companies that, together with their affiliates, are involved, *inter alia*, in the sale of cellular telephone equipment. The individual defendants—Kemal Uzan, Cem Cengiz Uzan, Murat Hakan Uzan, Melahat Uzan, Aysegul Akay, and Antonio Luna Betancourt—are members (or, in Betancourt's case, a close associate) of a prominent Turkish family, the Uzans, who control various Turkish businesses, including, *inter alia*, the three Turkish companies named as corporate defendants here and a large Turkish cellular telephone company called Telsim Mobil Telekomunikasyon Hizmetleri A.S. ("Telsim"). The plaintiffs allege, in essence, that the defendants, through a pattern of fraud, extortion, and other unlawful activities, are in the process of defrauding plaintiffs of more than $2.7 billion that plaintiffs lent to Telsim. To prevent defendants from further diverting and depleting such assets as might be available to repay this great sum, plaintiffs seek, in addition to damages, extensive preliminary injunctive relief, including, *inter alia*, the attachment of various New York properties and the deposit in the registry of this Court of certain Telsim shares held by defendant Standart Telekomunikasyon Bilgisayar Hizmetleri A.S. ("Standart Telekom") and pledged as collateral for the loans.

Following extensive briefing and a lengthy evidentiary hearing extending over six days, the Court, by orders issued May 9 and 10, 2002, concluded that plaintiffs were entitled to the preliminary relief they sought. This Opinion states the reasons for those rulings.

In the Second Circuit, a party seeking preliminary injunctive relief must demonstrate, first, that it will suffer irreparable harm in the absence of such relief, and, second, that either (a) there is a likelihood that the movant will succeed on the merits of its underlying claims or (b) there is a sufficiently serious question going to the merits of those claims as to make them a fair ground for litigation, coupled with a balance of hardships tipping decidedly in the

movant's favor. *See, e.g., Random House, Inc.* v. *Rosetta Books LLC*, 283 F.3d 490, 490 (2d Cir. 2002) (per curiam); *Brenntag Int'l Chemicals, Inc.* v. *Bank of India*, 175 F.3d 245, 249 (2d Cir. 1999). Where, moreover, the movant is seeking a "mandatory," rather than "prohibitory" injunction—*i.e.*, an injunction that will alter, rather than maintain the status quo or that will provide the movant with relief that cannot be undone, *see Beal* v. *Stern*, 184 F.3d 117, 122 (2d Cir. 1999)—the movant must, in satisfying the aforementioned standard, either demonstrate a "clear" or "substantial" likelihood of success or show that "extreme or very serious damage" will result from a denial of the injunction. *See, e.g., Beal*, 184 F.3d at 122-23; *Phillip* v. *Fairfield Univ.*, 118 F.3d 131, 133 (2d Cir. 1997).

Although "[t]he distinction between mandatory and prohibitory injunctions is not without ambiguities," *Tom Doherty Assocs., Inc.* v. *Saban Entertainment, Inc.*, 60 F.3d 27, 34 (2d Cir. 1995), the Court is doubtful that what plaintiffs here seek is properly classified as "mandatory" injunctive relief, since in essence they are simply seeking to preserve the status quo by ensuring that certain assets otherwise available to satisfy a judgment but threatened with being dissipated are effectively frozen—even if this means, in the case of the Telsim stock owned by Standart Telekom, moving it into the Court's registry. But even assuming *arguendo* that some of the injunctive relief here sought could be viewed as "mandatory," the Court finds that plaintiffs satisfy the heightened standard requisite thereto. In particular, the Court, based in substantial part on its assessments of the credibility (or lack thereof) of the parties' respective witnesses who testified at the preliminary injunction hearing and the corresponding inferences (positive or adverse, as the case may be) that the Court drew from those assessments, finds that plaintiffs have clearly demonstrated that they are substantially likely to succeed on the merits of their claims, and have further

demonstrated that very serious damage is likely to result if the requested relief is not granted.[1]

Plaintiffs first four causes of action allege violations of the Racketeer Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. § 1961 *et seq.* A threshold issue is whether injunctive relief is available to a private plaintiff bringing a civil action under RICO. The Second Circuit has never definitively ruled on the issue, but the two other circuits that have squarely decided it are divided on the result—*see Religious Technology Center* v. *Wollersheim*, 796 F.2d 1076 (9th Cir. 1986) (denying injunctive relief); *NOW, Inc.* v. *Scheidler*, 267 F.3d 687 (7th Cir. 2001) (granting injunctive relief)—and the Supreme Court recently granted certiorari in the latter case to resolve the split, *see Scheidler* v. *National Organization for Women, Inc.*, 535 U.S. 1016 (2002).

While the instant Court would gladly avoid the issue until the Supreme Court rules, that is not possible, for even though (as discussed *infra*) Motorola has an independent entitlement to injunctive relief under its state law claims, co-plaintiff Nokia has brought claims here only under RICO and a certain percentage of the Telsim stock that plaintiffs seek to transfer to this Court's registry is claimed as collateral by Nokia alone. Thus, at least so far as Nokia's application for injunctive relief is concerned, the issue of the availability of injunctive relief to a private RICO plaintiff must be decided now.

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[1] Each of the Court's more specific findings, set forth at various places *infra*, reflects a determination that the Court credited the testimony or other evidence cited in support of such finding (as well as, in most instances, additional supportive evidence not cited for the sake of brevity) and that the Court discredited any contrary evidence. Overall, the Court, based on its assessment of the witnesses' demeanor, consistency, and responsiveness, found plaintiffs' witnesses highly credible and defendants' witnesses frequently lacking in credibility.

In concluding that injunctive relief was not available to private RICO plaintiffs, the Ninth Circuit in *Wollersheim* relied heavily on extended inferences drawn from what the Seventh Circuit in *Scheidler* described as mere "snippets of legislative history." *Scheidler*, 267 F.3d at 699. In reaching the opposite result, the Seventh Circuit relied on what it characterized as the "unambiguous statutory language" of the applicable section of RICO, § 1964. *Id.* The present Court agrees with the result in *Scheidler*, but for somewhat different reasons.

As even the court in *Wollersheim* recognized, the right to grant injunctive relief in private civil actions in accordance with traditional principles of equity jurisdiction is one of the equitable powers given to federal courts by the Judiciary Act of 1789. *See Wollersheim*, 796 F.2d at 1083; *see generally, Grupo Mexicano de Desarrollo, S.A.* v. *Alliance Bond Fund, Inc.*, 527 U.S. 308, 318-19 (1999). It would be extraordinary indeed if Congress, in enacting a statute that Congress expressly specified was to be "liberally construed to effectuate its remedial purposes," Pub. L. No. 91-452, § 904(a), 84 Stat. 947 (1970), intended, without expressly so stating, to deprive the district courts of utilizing this classic remedial power in private civil actions brought under the act. Whether or not the language of § 1964 expressly confers this power as "unambiguously" as the Seventh Circuit asserts, it nowhere expressly denies courts this power in private civil actions, and thus the normal presumption favoring a court's retention of all powers granted by the Judiciary Act of 1789 prevails.

Furthermore, the Ninth Circuit's reading in *Wollersheim* of RICO's legislative history is far too narrow and wooden. RICO was originally conceived as a statute that would provide the Government, alone, with both criminal and civil remedies, with the former set forth in what became § 1963 and the latter in what became subsections (a) and (b) of § 1964. *See Sedima, S.P.L.R.* v. *Imrex Company, Inc.*,

473 U.S. 479, 487 (1985); *see generally* Jed S. Rakoff & Howard W. Goldstein (eds.), *RICO: Civil and Criminal Law & Strategy* § 1.01 (1989). Specifically, subsection (a) of § 1964 made express what was already inherent—that in civil RICO actions, as in other civil actions, the federal district courts have broad equitable powers. If anything, subsection (a) extended the courts' equitable jurisdiction in civil RICO actions beyond what was granted by the Judiciary Act of 1789, while subsection (b) gave the Government the right to bring such actions.

Since, however, the Government was not a victim and had not suffered any loss, there was no reference to damages in the original version of RICO that passed the Senate. It was only relatively late in the legislative process that the House added an amendment to give victims of racketeering activity a private right of action, and this amendment, which was copied from the Clayton Act and provided for treble damages, was tacked on to § 1964 in what is now subsection (c) thereof. *See Sedima*, 473 U.S. at 487-88.

Taken overall, then, what clearly emerges from the legislative history is that Congress intended to give private civil litigants a right to sue under RICO and that, since the Act nowhere else specified damages, this was expressly included in the amendment. But to go further and to suggest that Congress in so amending § 1964 to add a private right of action for damages thereby intended to deprive the district courts of applying to private civil RICO cases the courts' equitable powers and jurisdiction that subsection (a) of the Act so broadly affirmed is to push the legislative history far beyond what it can reasonably support.

Accordingly, the Court concludes that the instant plaintiffs may seek injunctive relief pursuant to their RICO claims.

While plaintiffs bring such claims here under each of the four subsections of RICO's "Prohibited Acts" section, § 1962, it is enough for present purposes to evaluate their likelihood of success under any of those claims, for each is broad enough to support the injunctive relief here sought. Consider Count III of the Complaint, which alleges that the defendants conducted the affairs of one or more enterprises through a pattern of racketeering activity and thereby caused economic injury to plaintiffs. *See* Complaint, ¶¶ 286-88. The Court finds that the plaintiffs have shown, by clear and convincing evidence, each essential element of this claim.

Of the two RICO enterprises alleged in the Complaint, the one that most particularly fits Count III is the "Uzan Association Enterprise," which the Complaint defines as an association in fact of the Uzans, their associates, and the various companies they control, including the named corporate defendants, Telsim, and such other companies as Rumeli Holding A.S., a holding company through which the Uzans exercise control over numerous entities. *See* Complaint ¶¶ 24-25, 242, 286.

At the hearing on the instant motion, the plaintiffs established, virtually without contradiction, that this Uzan-controlled business empire functioned as ongoing enterprise, with its own structure and hierarchy antedating and independent of the racketeering activities here alleged. *See, e.g., United States* v. *Turkette*, 452 U.S. 576, 583 (1981); *U.S.* v. *Coonan*, 938 F.2d 1553, 1559 (2d Cir. 1991). Each Sunday night, key members of the Uzan family would sit down to a dinner meeting at which the key business decisions were made with respect to the entire enterprise, with individual members of the family, including the individual defendants here, then delegated to carry out the decisions. *See, e.g.*, transcript at preliminary injunction hearing ("tr.") at 59, 423. At the same time, even those individual members of the family who functioned as chief

executive officers of particular business entities within the enterprise could not make major decisions without checking, not with their respective boards of directors (although those were also Uzan-controlled), but with the family hierarchy. *See, e.g.*, tr. 10, 27-29, 421-23, 857, 967-68.

Each of the defendants here was associated with the enterprise, and in the case of the individual defendants played a dominant role; but the enterprise itself was considerably greater than, and distinct from, any or all of the defendants. By virtue of their respective roles, however, the defendants were in a position to conduct the affairs of the enterprise, and, as the evidence here showed, that conduct sometimes consisted of racketeering activities.

So far as the plaintiffs here are concerned, defendants' racketeering activities primarily took the form of fraudulent schemes, in the execution of which, among numerous other means, international wire communications between Europe and New York were utilized, in violation of the wire fraud statute, 18 U.S.C. § 1343. (A partial listing of applicable wire transfers is appended as Attachment E to the Complaint). In particular, over a period of several years (beginning, in Motorola's case, as early as 1998), each of the plaintiffs (in ignorance of the other), was fraudulently induced to make to Telsim ever greater loans, and to forego repayment of prior loans, based on false representations that:

(i) the proceeds were to be used by Telsim for certain specified purposes (such as purchase of cellular telephone equipment from the plaintiffs), *see, e.g.*, tr. 869-71, 1221-22, *see also*, plaintiffs' exhibit ("Pl. Ex.") 79, defendants' exhibit ("Def. Ex.") 74;

(ii) Telsim's financial and business circumstances were sound and it was on the verge of being acquired or funded by other sound companies, *see, e.g.*, Pl. Ex. 64, 72, 75, 76, 78-79, 81, 85-87; and

(iii) plaintiffs' loans were fully collateralized by Telsim stock, *see, e.g.*, Pl. Ex. 75, 79; tr. 14.

In actuality, however, as the proof at the preliminary injunction hearing clearly established:

(i) at least $1 billion of the $2.7 billion loaned to Telsim by plaintiffs is unaccounted for, with some of it admittedly used for purposes other than those specified in the loan documents, *see e.g.*, Pl. Ex. 79; tr. 713, 870, 957-959, 1221, 1261, and much of it seemingly diverted by defendants to the benefit of the Uzan Association Enterprise, *see, e.g.*, tr. 56-59;

(ii) Telsim's financial condition was increasingly precarious (long before any alleged "crisis" in the Turkish economy on which defendants now seek to rely to conceal their fraud), *see, e.g.*, tr. 938-940, and its prospects for effecting a sale or merger of the company were far more remote than represented, *see, e.g.*, tr. 42-44, 53, 73-74, 938-940—facts which the defendants helped conceal from plaintiffs by withholding important financial data and by preventing plaintiffs from having meaningful access to third parties familiar with Telsim's merger prospects, *see, e.g.*, Pl. Ex. 87, 91; tr. 11, 83-84, 86-88; and,

(iii) defendants secretly and fraudulently diluted the value of plaintiffs' collateral, *see* Pl. Ex. 14, 36; tr. 89, 466.

This latter event was a particularly raw bit of business that well illustrates the defendants' fraudulent intent and their willingness to make use of the Uzan Association Enterprise to achieve their fraudulent purposes. Prior to the meeting, over 95% of the shares of Telsim were owned by two Uzan-controlled entities: Rumeli Holding, which owned 21.99% of the Telsim stock, and Rumeli Telefon Sistemleri A.S. ("Rumeli Telefon"), which owned a controlling 73.63% of the Telsim stock. Virtually the entirety of the Telsim stock owned by Rumeli Telefon had, in turn, been pledged to Motorola and Nokia as collateral

for their loans to Telsim. In inducing the plaintiffs to make ever greater loans, and in quieting plaintiffs' ever-growing fears about repayment, the Uzans repeatedly emphasized that, if all else failed, plaintiffs were fully protected by the value of this collateral. *See, e.g.*, Pl. Ex. 75, 79; tr. 14.

Eventually, however, as plaintiffs slowly learned more and more suspicious circumstances, it became ever more probable that plaintiffs would finally demand repayment and/or foreclose on the collateral. When this at last appeared imminent, the defendants, making use of the multiple opportunities afforded by the Uzan Association Enterprise to shift assets and ownership, convened on April 24, 2001, without the slightest notice to plaintiffs, a specially-called meeting of Telsim's shareholders, *see* tr. 81-82. At the meeting, the shareholders issued new shares that tripled the number of outstanding Telsim shares, but gave the prior shareholders "preemption rights" to purchase the new shares up to a level that would enable them to retain proportions of ownership corresponding to their prior percentages of ownership. Rumeli Telefon, however, "waived" its preemption rights, whereupon those rights were transferred to another Uzan-controlled entity, defendant Standard Telefon, which previously had owned only 0.32% of the Telsim stock. Standard Telefon then exercised the rights so transferred, thus magically increasing its percentage of Telsim stock to a controlling 66.48%. Meanwhile, the Telsim stock retained by Rumeli Telefon (and pledged to the plaintiffs) was reduced to 24.54% of the total shares, *i.e.*, one third of the original ownership. *See* Pl. Ex. 36; *see also*, tr. 598.

The net effect of this palpable fraud was to hugely dilute the value of plaintiffs' collateral, as well as effectively divesting them of such control of Telsim as they might have otherwise achieved if they had foreclosed on the collateral. Recognizing the fraudulence of their acts, moreover, the defendants not only kept the events of April 24 secret from

the plaintiffs (with whom they were in regular contact), *see, e.g.*, tr. 89, 466, 1204, but also did not even tell Telsim's chief financial officer, Fatih Azami, until several weeks had passed, *see* tr. 854.[2] As this also evidences, Telsim itself was but a pawn in the Uzan Association Enterprise.

As for defendants' contention the issuance of the new shares was simply motivated by legal concerns over maintaining a sufficient capitalization to meet new Turkish investment certificate requirements, both plaintiffs' and defendants' Turkish law experts testified that, if such recapitalization was required at all for this purpose, it was not required, at the earliest, before December 2001, *see* tr. 610, 985. Moreover, nothing in the alleged recapitalization requirement required dilution of the proportionate value of the collateral, let alone keeping this secret from plaintiffs. The Court rejects the proffered excuse as itself nothing but a sham.

Eventually, plaintiffs learned of the dilution, and, with their suspicions now fully aroused, began investigating whether they had indeed been defrauded. *See, e.g.*, tr. 90-97, 103, 467-468. Defendants retaliated by use of fear and extortion, and thereby violated another RICO predicate, the Hobbs Act, 18 U.S.C. § 1951. Specifically, the defendants arranged for a lawyer for the Uzan family to initiate Turkish criminal proceedings against the executive hierarchy of both Motorola and Nokia, accusing them, in a sworn complaint that is frivolous on its face and unsupported by a single credible fact of record, of making "explicit and armed threats to kill" the Uzan family. Pl.

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[2] Remarkably, none of the Uzan defendants, even the one (Cem Uzan) who is not challenging the Court's personal jurisdiction, chose to appear at the preliminary injunction hearing—a fact from which the Court draws the obvious adverse inferences. Instead, they sent poor Mr. Azami, who, as the above testimony indicates, was kept in the dark by the Uzans as to critical decisions.

Ex. 99. Attempting to utilize the fear thereby engendered (especially since several of the executives so accused were within Turkish jurisdiction), *see* tr. 1067-69, the defendants then informed plaintiffs that, if only plaintiffs would agree to defer seeking repayment of the overdue loans, defendants would arrange to have the criminal charges dropped, *see* tr. 90-93. As this testimony (which the Court fully credits) well illustrates, this was a classic extortion scheme in clear violation of the Hobbs Act. *See, e.g., United States* v. *Abelis*, 146 F.3d 73, 82 (2d Cir. 1998).[3]

From the foregoing alone (and there is much more), it is clear that defendants have for several years now conducted the affairs of the Uzan Association Enterpirse through a pattern of racketeering activities and have thereby directly and proximately injured plaintiffs, who not only relied to their detriment on defendants' false representations but who have now seen their monies diverted from Telsim and the Telsim shares on which they ultimately relied for repayment diluted to a small fraction of their former value.

Moreover, defendants' open-ended racketeering scheme continues apace, threatening still further injury to plaintiffs' business and property. For example, as recently as January of this year, the defendants arranged, in another unannounced Telsim shareholders' meeting, for the voting rights of the remaining Telsim shares pledged to plaintiffs to be diminished, while the voting rights of the unencumbered shares were greatly increased, thus further reducing

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[3] While some lower courts have held that the threat of civil litigation or even the initiation of unjustified civil lawsuits does not constitute a Hobbs Act predicate act under RICO, *see, e.g., G-I Holdings, Inc.* v. *Baron & Budd*, 179 F. Supp. 2d 233, 259 (S.D.N.Y. 2001); *Nakahara* v. *Bal*, 1998 WL 35123, at *7 (S.D.N.Y. Jan. 30, 1998), none of these cases (which, in any event, are not binding on this Court) involved, as here, the perjurious obtaining of a criminal charge in order to induce physical fear immediately used to try to extort economic concessions.

plaintiffs' opportunity for recovery (and further increasing the need for injunctive relief by this Court).[4] *See* Pl. Ex. 39, *see also*, tr. 610-615.

This step was taken, moreover, in the teeth of defendants' repeated promises—never fulfilled—to restore plaintiffs' collateral to its original status. *See, e.g.*, tr. 89, 90, 101, 467-469, 861; *see also*, Pl. Ex. 100, 101. Indeed, the Court finds that defendants, by repeatedly making these representations even during the course of this litigation while taking no actions to fulfill their pledge and instead offering sham excuses and false testimony, have carried their fraud into the court itself.

Under these circumstances, it is clear that plaintiffs are likely to suffer severe further injury if the Court does not grant the requested injunctive relief necessary to preserve the status quo and prevent any further diversion or diminution of the assets available for repayment. *See, e.g.*, *Brenntag*, 175 F.3d at 249, *Republic of Philippines* v. *Marcos*, 806 F.2d 344, 356 (2d Cir. 1986) ("preliminary injunctions are proper to prevent a defendant from making a judgment uncollectable").

In short, plaintiffs, having clearly demonstrated that they are substantially likely to succeed on their RICO claim under Count III, and having further demonstrated that, in the absence of the requested relief, they are likely to suffer severe injury, are fully entitled to the relief here sought.[5]

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[4] After plaintiffs commenced this lawsuit on January 28, 2002, defendants asserted that the January resolution had never become "effective." *see* tr. 1287. Under all the facts and circumstances, the Court draws the inference that defendants did not implement the resolution only because it would further expose their fraud in the eyes of the Court, and that, unless prevented by appropriate injunctive relief, they will likely seek an opportunity to implement the resolution in the future.

[5] While, given the Court's findings that plaintiffs are substantially likely to prevail on their claims, there is no need to assess any

Defendants, however, in addition to challenging the availability of private injunctive relief under RICO (as discussed *supra*) also argue that the plaintiffs lack standing at this time either to bring their RICO claims or to seek injunctive relief predicated on those claims, because they have not exhausted their legal remedies against Telsim nor thereby ascertained precisely what their RICO damages will be, *see First Nationwide Bank* v. *Gelt Funding Corp.*, 27 F.3d 763, 768 (2d Cir. 1994). In *First Nationwide*, however, the plaintiff sought to bring a RICO claim against the very borrower on whose collateral the plaintiff had not yet fully foreclosed and as to whom ordinary collection proceedings were far from completed. Here, by contrast, the borrower (Telsim) is not a party at all, and the named defendants, who are accused, *inter alia*, of fraudulently inducing the plaintiffs to extend the $2.7 billion in loans and of diverting it to their benefit, are independently liable for this known and certain sum, regardless of whether plaintiffs

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alleged hardship to defendants from the requested injunctive relief, in fact there is none. (Defendants are, moreover, fully protected against any error in this Court's ruling by their right to immediate appeal and by the very substantial bond of $ 2,000,000 that the Court has ordered plaintiffs to post.) Although defendants argue that the placement of the Telsim shares in this Court's registry could negatively impact Telsim's telecommuni-cations license because of a Turkish requirement of 50% Turkish ownership, the Court is, needless to say, neither assuming ownership itself nor transferring it at this time, so that the Turkish requirement continues to be met. Indeed, the Turkish Ministry of Telecommunication and Transportation had previously made clear that there was no prohibition to the very shares in question being held in escrow in a Swiss bank in connection with certain arbitration proceedings that might arise (discussed *infra*). *See* Pl. Ex. 57, 58. The Court, moreover, credits plaintiffs' expert's opinion that such transfer would present no problem under Turkish law. Tr. 616-620. By contrast, defendants' expert, while contending that the transfer would present problems, was obliged to concede that the Turkish Ministry had effectively rejected his interpretation. Tr. 1003-04.

pursue their alternative remedies against Telsim or not. Similarly, even the portion of the injunctive relief relating to Telsim stock is relief sought, as a practical matter, not from Telsim, but from the current owners of the stock and from those who, by controlling the Uzan Association Enterprise, are in a position to divert Telsim's monies and diminish the value of plaintiffs' collateral. *See GICC Capital Corp.* v. *Technology Fin. Group, Inc.*, 30 F.3d 289, 293 (2d Cir. 1994) ("when a corporation fraudulently is caused to issue debt and stripped of its assets in a manner that obviously will leave the creditors unpaid, those creditors have [RICO] standing"); *see also In re Merrill Lynch Ltd. P'ships Litig.*, 154 F.3d 56, 59 (2d Cir. 1998) (distinguishing *First Nationwide* on other grounds).

Beyond all this, Motorola is independently entitled to the injunctive relief it here seeks by virtue of its Illinois state and common law claims against defendants, including, *inter alia*, claims for common law fraud (Count V), promissory fraud (Count VI), and civil conspiracy (Count VII).[6] From the foregoing recitations, it is clear that plaintiffs have shown a likelihood of success under each of these claims, and neither side questions the fact that Illinois law empowers courts to impose the full range of injunctive relief to prevent irreparable harm. *See, e.g., Caterpillar, Inc.* v. *Jerryco Footwear, Inc.*, 880 F. Supp. 578, 587 (C.D. Ill. 1994); *People ex rel. Hartigan* v. *Dynasty System Corp.*,

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[6] While two of these claims are brought against defendants Hakan Uzan and Cem Cengiz Uzan alone, the claim for civil conspiracy is brought against all defendants. Moreover, the proof before the Court shows that Hakan Uzan and Cem Uzan stand, along with their father Kemal Uzan, at the very pinnacle of the Uzan business empire, and a court applying Illinois law can impose injunctive remedies against not only named defendants but also those acting in concert with them or subject to their control. *See, e.g., People ex rel. Scott* v. *Master Barbers & Beauty Culturists Ass'n.*, 293 N.E.2d 393, 397 (1973).

471 N.E.2d 236 (4th Dist. 1984). Moreover, the Illinois claims are in no way subject to such limitations as may arguably exist with respect to the RICO claims by virtue of *First Nationwide*. *See, e.g., Bank of Ravenswood* v. *City of Chicago*, 717 N.E.2d 478, 483-84 (1st Dist. 1999) ("cause of action accrues at the time [the plaintiff's] interest is invaded; the mere fact that the extent of its damages is not immediately ascertainable does not postpone the accrual of a plaintiff's claim"); *see also Austin* v. *House of Vision, Inc.*, 243 N.E.2d 297 (1st Dist. 1968) ("Illinois courts have held that an action sounding in tort accrues at, and limitations begin to run from, the date on which there is a wrongful invasion of personal or property rights, regardless of the time when the full extent of the injury or damages sustained is ascertained").

While defendants offer a hodgepodge of other objections to plaintiffs' motion for preliminary injunctive relief—all of which have been considered, and rejected, by the Court—only a few deserve mention here.

First, defendants renew their argument, previously rejected by the Court in its Order dated February 15, 2002, that, under the doctrine of *Grupo Mexicano, supra*, this Court lacks authority to issue a preliminary injunction preventing petitioners from disposing of their assets pending adjudication of plaintiffs' claim for damages. *Grupo Mexicano*, however, was addressed to the situation where an unsecured creditor seeks to restrain the general assets of its debtor in aid of collecting the debt. Since the Judiciary Act of 1789 conveyed to federal courts only the equity jurisdiction exercised by the High Court of Chancery in England at that time, and since, at that time, a general unsecured creditor was not entitled to such a prior restraint of a debtor's assets, the Supreme Court held in *Grupo Mexicano* that a federal court lacked power to issue such an injunction. *Grupo Mexicano*, 527 U.S. at 318. By contrast, however, as the Supreme Court in *Grupo Mexicano* further

indicated, such equitable remedies are available, both historically and now, to creditors possessing a lien or equitable interest in the property at issue, *see Grupo Mexicano* at 329-33, and subsequent decisions have expressly so held. *See Wishnatzki & Nathel, Inc.* v. *H.P. Island-Wide, Inc.*, 2000 WL 1610790, *1-2 (S.D.N.Y. October 27, 2000) (and cases there cited); *see also Deckert* v. *Independence Shares Corporation*, 311 U.S. 282, 289 (1940). Here, the portions of plaintiffs' requested preliminary relief that defendants chiefly challenge—*i.e.*, the transfer to this Court's registry, in aid of a proposed constructive trust, *see* Compl. at ¶ 337, of the Telsim shares held by defendant Standart Telekom that are pledged as collateral for plaintiffs' loans, as well as restraints on defendants' ability to further transfer or dilute the stock—are equitable remedies sought in aid of preserving an asset in which the plaintiffs have an acknowledged equitable interest. Accordingly, the doctrine of *Grupo Mexicano* poses no bar to the requested relief.

Furthermore, even if (contrary to fact) such relief were not available under the Court's general equitable powers conveyed by the Judiciary Act of 1789, it would be available under the specific grant of power given by Congress under § 1964(a) of RICO, which expressly provides that the "district courts of the United States shall have jurisdiction to prevent and restrain violations of section 1962 of this chapter by issuing appropriate orders, including, but not limited to: ordering any person to divest himself of any interest, direct or indirect, in any enterprise; [and] imposing reasonable restrictions on the future activities or investments of any person; . . . ." Finally, because Illinois law, as previously noted, clearly permits such injunctive relief, it would be available in a federal court that, as here, has jurisdiction over an Illinois claim. *See Grupo Mexicano*, 527 at 319 n.3 (noting that this argument was not there preserved).

Second, defendants argue that this entire case is simply an "end run" around the contractual agreements between plaintiffs and Telsim to submit any disputes to arbitration in Switzerland, and that, consequently, this Court has no jurisdiction to entertain this action. But, as the foregoing findings of fact make evident, plaintiffs have already demonstrated a clear likelihood of success on their contentions, *inter alia*, that the Telsim contracts were induced by fraud and that the instant defendants, rather than Telsim, were the real parties in interest, operating outside the confines of Telsim and using it simply as a front. Consequently, the arbitration provisions of the Telsim contracts are a total irrelevancy.

Furthermore, even if this were not so, the arbitration clause in the contract between Motorola and Telsim expressly provides that "nothing in this section will prevent either party from resorting to judicial proceedings if ... interim relief from a court is necessary to prevent serious and irreparable injury to one party or to others." Def. Ex. 5. While the situation with respect to Nokia is more complicated, both because Nokia, though the real party in interest, made its loans via an intermediary, ABN-AMRO Bank, N.V. ("ABN"), and also because the corresponding contracts do not contain as explicit a grant as the above-quoted clause, nevertheless, "entertaining an application for a preliminary injunction in aid of arbitration is consistent with the court's power . . . ." *Borden, Inc.* v. *Meiji Milk Products, Co.*, 919 F.2d 822, 826 (2d Cir. 1990).

Third, all defendants except Cem Cengiz Uzan (who concedes the Court's personal jurisdiction) argue that the Court lacks personal jurisdiction over them and therefore lacks jurisdiction to impose any restraint upon them. But the Complaint adequately alleges personal jurisdiction, and this is sufficient until the matter is properly challenged on an evidentiary basis. Defendants, indeed, propose to mount such a challenge, but on their own volition have chosen to

schedule the briefing and argument of that motion for several weeks hence. For them to raise the same objection here is therefore premature.

That said, it may also be noted that, even at the hearing on the preliminary injunction, plaintiffs adduced considerable evidence indicating their personal jurisdiction over all defendants, both under RICO, *see* 18 U.S.C. § 1965, and under the applicable law of New York. Among much else, there was ample evidence that most of the individual defendants reside in New York, have New York driver's licenses, maintain New York bank accounts, and do business in New York, as well as serving as principals for the corporate defendants. *See Dixon* v. *Mack*, 507 F. Supp. 345, 350 (S.D.N.Y. 1980).

Furthermore, even if any defendant succeeds in convincing the Court, in the forthcoming motion practice on personal jurisdiction, that the plaintiffs have failed to carry their burden of establishing personal jurisdiction over that particular defendant, so that that defendant must be dismissed from the lawsuit, even that defendant may still be subject to the injunctive relief already granted to the extent that he, she, or it is acting in concert with a defendant properly before the Court.

Fourth, defendants argue that injunctive relief must be denied because of plaintiffs' failure to join two parties allegedly indispensable to the granting of such relief, namely, Telsim and Rumeli Telefon. But while these two entities will undoubtedly figure in this lawsuit, they are in no sense indispensable to a lawsuit that neither seeks relief from them nor threatens to affect them more than tangentially. In particular, the Telsim shares that are the focus of the contested injunctive relief are owned by Standart Telekom and controlled by the Uzan family. More generally, even to the extent that Telsim and Rumeli Telefon are indirectly implicated in this lawsuit, the Court sees little reason to conclude that their interests will not be

more than adequately represented by the individual defendants in this suit who, as majority shareowners in both corporations, have heavily aligned interests.[7]

Accordingly, for the foregoing reasons, the Court hereby reaffirms its Orders of May 9 and May 10, 2002 granting plaintiffs' requested relief.

/s/
JED S. RAKOFF, U.S.D.J.

[7] To the extent that defendants also contend that ABN is also an indispensable party, the Court can see no reason why its interests will not be adequately represented by Nokia which is the real party in interest with respect to the loans that ABN extended to Telsim. *See* tr. 415-416, 441, 495.

APPENDIX N

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT
THURGOOD MARSHALL U.S. COURT HOUSE
40 FOLEY SQUARE
NEW YORK 10007

[December 16, 2004]

Roseann H. MacKechnie
CLERK

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, Foley Square, in the City of New York, on the 16th day of Dec. two thousand four.

03-7792-cv-(L)

MOTOROLA CREDIT v. UZAN

A petition for panel rehearing and a petition for rehearing en banc having been filed herein by the appellants Kemal Uzan, Melahat Uzan, Murat H. Uzan, et al.

Upon consideration by the panel that decided the appeal, it is Ordered that said petition for rehearing is **DENIED.**

It is further noted that the petition for rehearing en banc has been transmitted to the judges for the court in regular active service and to any other judge that heard the appeal and that no such judge has requested that a vote be taken thereon.

For the Court,
Roseann B. MacKechnie, Clerk

By: /s/ Arthur Heller
Motion Staff Attorney

APPENDIX O

CONSTITUTIONAL AND STATUTORY PROVISIONS

1. The Federal Arbitration Act, 9 U.S.C., § 1 *et seq.*, provides in relevant part:

* * * * *

§ 2. Validity, irrevocability and enforcement of agreements to arbitrate

A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.

§ 3. Stay of proceedings where issue therein referable to arbitration

If any suit or proceeding be brought in any of the courts of the United States upon any issue referable to arbitration under an agreement in writing for such arbitration, the court in which such suit is pending, upon being satisfied that the issue involved in such suit or proceeding is referable to arbitration under such an agreement, shall on application of one of the parties stay the trial of the action until such arbitration has been had in accordance with the terms of the agreement, providing the applicant for the stay is not in default in proceeding with such arbitration.

§ 4. Failure to arbitrate under agreement; petition to United States court having jurisdiction for order to compel arbitration; notice and service thereof; hearing and determination

A party aggrieved by the alleged failure, neglect, or refusal of another to arbitrate under a written agreement for arbitration may petition any United States district court which, save for such agreement, would have jurisdiction under Title 28, in a civil action or in admiralty of the subject matter of a suit arising out of the controversy between the parties, for an order directing that such arbitration proceed in the manner provided for in such agreement. Five days' notice in writing of such application shall be served upon the party in default. Service thereof shall be made in the manner provided by the Federal Rules of Civil Procedure. The court shall hear the parties, and upon being satisfied that the making of the agreement for arbitration or the failure to comply therewith is not in issue, the court shall make an order directing the parties to proceed to arbitration in accordance with the terms of the agreement. The hearing and proceedings, under such agreement, shall be within the district in which the petition for an order directing such arbitration is filed. If the making of the arbitration agreement or the failure, neglect, or refusal to perform the same be in issue, the court shall proceed summarily to the trial thereof. If no jury trial be demanded by the party alleged to be in default, or if the matter in dispute is within admiralty jurisdiction, the court shall hear and determine such issue. Where such an issue is raised, the party alleged to be in default may, except in cases of admiralty, on or before the return day of the notice of application, demand a jury trial of such issue, and upon such demand the court shall make an order referring the issue or issues to a jury in the manner provided by the Federal Rules of Civil Procedure, or may specially call a jury for that purpose. If the jury find that no agreement in writing

for arbitration was made or that there is no default in proceeding thereunder, the proceeding shall be dismissed. If the jury find that an agreement for arbitration was made in writing and that there is a default in proceeding thereunder, the court shall make an order summarily directing the parties to proceed with the arbitration in accordance with the terms thereof.

* * * * *

§ 16. Appeals

(a) An appeal may be taken from--

(1) an order--

(A) refusing a stay of any action under section 3 of this title,

(B) denying a petition under section 4 of this title to order arbitration to proceed,

(C) denying an application under section 206 of this title to compel arbitration,

(D) confirming or denying confirmation of an award or partial award, or

(E) modifying, correcting, or vacating an award;

(2) an interlocutory order granting, continuing, or modifying an injunction against an arbitration that is subject to this title; or

(3) a final decision with respect to an arbitration that is subject to this title.

(b) Except as otherwise provided in section 1292(b) of title 28, an appeal may not be taken from an interlocutory order--

(1) granting a stay of any action under section 3 of this title;

(2) directing arbitration to proceed under section 4 of this title;

(3) compelling arbitration under section 206 of this title; or

(4) refusing to enjoin an arbitration that is subject to this title.

§ 201. Enforcement of the Convention

The Convention on the Recognition and Enforcement of Foreign Arbitral Awards of June 10, 1958, shall be enforced in United States courts in accordance with this chapter.

§ 202. Agreement or award falling under the Convention.

An arbitration agreement or arbitral award arising out of a legal relationship, whether contractual or not, which is considered as commercial, including a transaction, contract, or agreement described in section 2 of this title, falls under the Convention. An agreement or award arising out of such a relationship which is entirely between citizens of the United States shall be deemed not to fall under the Convention unless that relationship involves property located abroad, envisages performance or enforcement abroad, or has some other reasonable relation with one or more foreign states. For the purpose of this section a corporation is a citizen of the United States if it is incorporated or has its principal place of business in the United States.

* * * * *

§ 206. Order to compel arbitration; appointment of arbitrators

A court having jurisdiction under this chapter may direct that arbitration be held in accordance with the agreement at any place therein provided for, whether that place is within or without the United States. Such court may also appoint arbitrators in accordance with the provisions of the agreement.

* * * * *

§ 208. Chapter 1; residual application

Chapter 1 applies to actions and proceedings brought under this chapter to the extent that chapter is not in conflict with this chapter or the Convention as ratified by the United States.

2. The Swiss Federal Statute on Private International Law of December 18, 1987, BBI 1988 1 5, RO 1988 1776, provides in relevant part:

* * * * *

Art. 7.

If the parties have concluded an arbitration agreement concerning an arbitrable dispute, the Swiss court invoked shall decline jurisdiction unless:

a. the defendant has made an appearance in the proceeding without reservation;

b. the court determines that the arbitration agreement is void, without effect, or cannot be fulfilled; or

c. the arbitral tribunal cannot be constituted due to reasons for which the defendant in the arbitration proceedings is obviously responsible.

Supreme Court, U.S.
FILED
APR 14 2005
OFFICE OF THE CLERK

No. 04-1255

IN THE

Supreme Court of the United States

KEMAL UZAN, CEM CENGIZ UZAN, MURAT HAKAN UZAN, MELAHAT UZAN, AND AYSEGUL AKAY,
Petitioners,

v.

MOTOROLA CREDIT CORPORATION AND NOKIA CORPORATION,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF FOR RESPONDENTS MOTOROLA CREDIT CORPORATION AND NOKIA CORPORATION IN OPPOSITION

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RULE 29.6 CORPORATE DISCLOSURE STATEMENT

1. Respondent Motorola Credit Corporation ("MCC") is a wholly-owned subsidiary of Motorola, Inc. No publicly held company other than Motorola, Inc. owns 10% or more of MCC's stock.

2. Respondent Nokia Corporation is a publicly held company. No publicly held company owns 10% or more of Nokia's stock.

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OPINIONS BELOW

In addition to those set forth in the Petition, the following unreported orders are relevant: the district court's order denying a stay of the preliminary injunction (Resp. App. 1a); the court of appeals' orders denying such a stay (Resp. App. 3a, 5a); the district court's opinion and order finding Defendants in contempt (Resp. App. 7a); and the district court's memorandum order directing Defendants to withdraw interfering Turkish injunction actions (Resp. App. 18a). The district court's memorandum order regarding stay pending appeal (Resp. App. 23a) is reported at 275 F. Supp. 2d 519.

STATUTES AND TREATY PROVISIONS INVOLVED

Relevant provisions of the Federal Arbitration Act ("FAA"), 9 U.S.C. §§ 1-208 (2000), are set forth in the Appendix to the Petition (Pet. App. 296a-300a).

The Convention on the Recognition and Enforcement of Foreign Arbitral Awards, June 10, 1958, 21 U.S.T. 2517, 330 U.N.T.S. 3 (the "Convention") provides in relevant part:

Article II

> 1. Each Contracting State shall recognize an agreement in writing under which the parties undertake to submit to arbitration all or any differences which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not, concerning a subject matter capable of settlement by arbitration.
>
> 2. The term "agreement in writing" shall include an arbitral clause in a contract or an arbitration agreement, signed by the parties or contained in an exchange of letters or telegrams.
>
> 3. The court of a Contracting State, when seized of an action in a matter in respect of which the parties have made an agreement within the meaning of this article, shall, at the request of one of the parties, refer the parties

to arbitration, unless it finds that the said agreement is null and void, inoperative or incapable of being performed.

PRELIMINARY STATEMENT

The Petition seeks to locate this case within claimed circuit conflicts that have no bearing here. This effort relies on three fundamental misconceptions. *First*, the Petition casts this case as a commercial loan dispute governed by contracts containing arbitration clauses. As the courts below recognized, however, this is a tort action, against individual tortfeasors, for fraud, conspiracy and extortion. The case in no way arises from the loan contracts invoked by the Uzans. *Second*, the Petition glosses over the incontrovertible fact at the center of this case: the Uzans have no agreement of any kind with the Respondents, much less an agreement in writing to arbitrate. The Uzans are not parties to the loan contracts they try to invoke. *Third*, the Petition focuses on arbitrability decisions in domestic cases, decided under Chapter 1 of the Federal Arbitration Act ("FAA"), 9 U.S.C. §§ 1-16 (2000). This case, however, is an international dispute governed by the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the "Convention"), and Chapter 2 of the FAA, 9 U.S.C. §§ 201-208.

Viewed in light of these realities, Petitioners' asserted grounds for certiorari are illusory. Because the Uzans are not parties to the contracts, the district court found their appeal frivolous, and the court of appeals refused to grant a stay. The circuits agree that in these circumstances an appeal does not divest the district court's jurisdiction. The claimed circuit split invoked in the first question is not implicated here.

Similarly, Petitioners' asserted conflict on choice of law concerns the choice between American state and federal law in domestic cases decided under FAA Chapter 1. Because this is an *international* dispute, it is outside that circuit split. Under the Convention and Chapter 2, this international dispute is governed by the foreign law chosen by the parties.

There is an additional reason to deny certiorari. The Uzans have made clear, through their conduct and statements, that they do not recognize U.S. jurisdiction over them. They are now international fugitives who cannot be found for enforcement. This Court should decline to exercise its discretionary jurisdiction where those seeking review will obey the Court's judgment only if it favors them.

STATEMENT OF THE CASE

Motorola Credit Corporation ("MCC") and Nokia Corporation ("Nokia") sued five members and a close associate of the Uzan family, and three Uzan-owned companies, for frauds that began with the fraudulent inducement of billions of dollars in loans. The frauds also included diversion of assets, extortion, and theft of the collateral. Pet. App. 68a-71a, 282a-287a. The Uzans ultimately "carried their fraud into the court itself," through disobedience of court orders, "sham excuses, and false testimony." Pet. App. 287a; *id.* 98a, 216a. The Uzans were found liable for their own misconduct, in their individual capacities, and not for the debts or acts of the companies they used as instruments to commit their frauds. Pet. App. 3a-6a, 17a, 292a, *see also id.* 95a-97a, 288a-289a.

A. The Uzans

At the time of the loans, the Uzans were a prominent Turkish business family that owned more than 130 companies, including banks, construction companies, utilities, media outlets, and communications companies. Pet. App. 69a, 137a-142a. Though Turkish citizens, the Uzans had New York apartments, bank accounts, and driver's licenses, owned companies headquartered in New York, and had continuous contacts with New York. Pet. App. 120a-137a.

The Uzans ran their business empire as a single enterprise, disregarding corporate formalities, shifting assets, and commingling business and personal expenses. Pet. App. 145a-148a. In 2003, the Uzan business empire crumbled. After the

Turkish government discovered an unrelated $6 billion fraud at an Uzan-owned bank, it seized the Uzans' companies. Pet. App. 13a n.6. The family leaders, Hakan and Kemal Uzan, are now international fugitives, subject to arrest in Turkey and wanted by Interpol. Others are subject to arrest in England. Pet. App. 223a. All of the Uzans are subject to arrest in the United States for contempt of the district court's orders. Pet. App. 246a. The Uzans' lead trial counsel recently moved to withdraw, in part because those counsel have not heard from several of their clients since mid-2003.

B. The Uzans' Frauds and Defiance of Court Orders

From 1998 to 2000, the Uzans fraudulently induced MCC and Nokia to lend more than $2.7 billion to an Uzan-owned company, "Telsim," for construction and operation of Turkey's second-largest cellular telephone system. The loans were secured by a controlling bloc of Telsim shares. Pet. App. 69a-70a. The Uzans induced the loans with false representations concerning the "business practices and finances of Telsim, the value and security of the collateral, the uses to which prior loan proceeds had been put, the status of other financing for Telsim, the existence and value of offers to purchase part or all of Telsim, and the status of" such purchase negotiations. Pet. App. 4a-5a.

From the outset, "defendants sought to enrich themselves at plaintiffs' expense." Pet. App. 199a. The Uzans "saw plaintiffs' loans to Telsim as a great opportunity to funnel vast sums into their control and then divert them wherever they chose, whether to prop up other companies in their far-flung enterprise or to simply launder monies into their own pockets." *Id.* The Uzans siphoned at least $1.135 billion of the lent funds for their own purposes, including at least $296 million into their personal accounts. Pet. App. 199a-204a. The Uzans used these funds for personal items "including at least four yachts, seven luxury apartments in the Trump World Tower, two jet planes, one helicopter, personal credit

card bills, etc." Pet. App. 201a; *d.* 70a. The full extent of the embezzlement remains unknown, due to the Uzans' refusal to provide discovery. Pet. App. 70a, 199a-200a.

While embezzling the loan proceeds, the Uzans also stole the collateral. Through secret shareholder actions, the Uzans diluted and ultimately destroyed the Telsim shares escrowed to secure the loans. Pet. App. 5a, 205a-212a, 283a-287a. The Uzans also tried to extort repayment concessions by filing false criminal charges in Turkey, accusing Plaintiffs' executives of "making explicit and armed threats to kill" Uzan family members. Pet. App. 5a, 214a-216a, 285a-286a.

In January 2002, MCC and Nokia sued the Uzans, one of their confederates, and three Uzan-owned companies involved in the dilution of the collateral and diversion of loan proceeds. Plaintiffs asserted fraud and tort claims under Illinois law and federal statutes including RICO. Pet. App. 3a, 6a. Plaintiffs did not sue Telsim, nor did they sue on the loan contracts. *Id.* Indeed, Plaintiffs are arbitrating with Telsim on the loan contracts.[1] Plaintiffs sued the tortfeasors who defrauded them—the Uzans, who used Telsim and other companies they own as tools to defraud the Plaintiffs.[2] Pet. App. 17a, 97a, 288a-289a, 292a.

The Uzans' conduct during the litigation was marked by unprecedented dishonesty, and thorough defiance of every order against them. Their dishonesty included patently incredible in-court testimony, sham promises to obey orders, and incredible excuses for not doing so. Pet. App. 216a,

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[1] Nokia's financing agent, ABN-Amro, has been arbitrating with Telsim since before this lawsuit. Pet. 5. Defendants caused Telsim to initiate arbitration against MCC in February 2002, shortly after this suit was filed. Pet. App. 8a n.3. Despite repeated representations that they "consent" to arbitrating with Plaintiffs, the Uzans have never sought to join either arbitration.

[2] Plaintiffs did not sue the Uzans as company officers. Pet. 6. They sued the Uzans as individuals, for their own tortious acts. Pet. App. 97a.

287a; *see id.* 216a-228a; Resp. App. 10a n.2, 15a-16a, 27a-28a. The magistrate judge concluded the Uzans had been "lying to the Court since I got involved in this case," while Judge Rakoff noted that "the degree to which defendants have misled this Court is, frankly, unparalleled in this Court's experience." Resp. App. 27a n.1. The Uzans' defiance of orders included refusing to deposit the collateral with the court; obtaining *ex parte* Turkish injunctions purporting to prohibit deposit of the collateral; filing resolutions that destroyed the value of the collateral (one day after being ordered not to do so); refusing to provide discovery or appear for deposition; obtaining *ex parte* injunctions from Turkish courts purporting to enjoin this lawsuit, and defying orders to have those interfering injunctions withdrawn. Pet. App. 6a-9a, 115a, 216a-228a; Resp. App. 1a-2a, 8a-16a, 27a-30a.

The district court held the Uzans in contempt, and imposed fines small and large, but was unable to coerce obedience. Pet. App. 7a-8a & n.8, 117a-118a, 217a-220a; Resp. App. 17a, 30a. The Uzans repeatedly and falsely promised compliance, and offered sham excuses, until the district court concluded such excuses were beyond belief. Pet. App. 117a-118a, 216a, 287a; Resp. App. 27a-28a; C.A. App. 1761. Thereafter, they openly told the district court they would continue to resist its jurisdiction and would not obey its orders. Resp. App. 32a-33a. The Uzans remain in contempt of the district court's orders, including the order to deposit the collateral, and are subject to jail for their contempts. Pet. App. 246a. Their conduct led the district court to "the single and overwhelming inference that [the Uzans] never had any intention to fully and fairly litigate this matter, or to abide by the rule of law or to do anything but thumb their noses at the Courts of the United States." C.A. App. 1894.

C. The District Court Rejects Arbitration

The Uzans claimed the case was required to be arbitrated under Telsim's loan contracts. The Uzans were not parties to

those contracts, and disavowed any obligation under them. Pet. App. 8a, 15a-16a, 113a; C.A. App. 437, 629, 1156.

The Uzans sought arbitration under FAA Chapter 2, which implements the Convention. Pet. App. 15a. Article II(1) of the Convention requires each nation to recognize any "agreement in writing" providing for arbitration of disputes. Article II(2) defines "agreement in writing" as "an arbitral clause in a contract or an arbitration agreement, *signed by the parties* or contained in an exchange of letters or telegrams." 21 U.S.T. at 2519 (emphasis added). Where such an agreement exists, Article II(3), implemented by 9 U.S.C. § 206, allows district courts to compel arbitration "in accordance with the agreement." § 206. The Uzans admitted they were not parties to the arbitration agreements. C.A. App. 418, 437, 1156. They sought arbitration only under U.S. or Swiss equitable principles. Pet. App. 16a, 22a, 271a.

When MCC and Nokia sought a preliminary injunction requiring the Uzans to deposit the collateral with the district court, the Uzans argued arbitrability in resistance. The district court ruled the loan contracts and their arbitration clauses were "a total irrelevancy" because MCC and Nokia were not suing on the loans, but instead were pursuing a fraud action against individual tortfeasors with whom they had no contract to arbitrate. Pet. App. 292a. The district court granted the preliminary injunction, and denied a stay pending appeal upon learning that the Uzans had violated the injunction the day after it was entered. Resp. App. 1a-2a, 9a, 11a; Pet. App. 115a. The Uzans moved the court of appeals for an emergency stay of the injunction, citing their arbitrability contention, but were twice denied. Resp. App. 4a, 6a.

The district court heard argument on the motion to compel arbitration.[3] The Uzans argued that even though they had no

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[3] The Uzans did not seek to stay litigation pending decision of their arbitration motion. Pet. App. 61a, Resp. App. 19a. Instead, they argued

agreement to arbitrate, under Swiss law (which governs Telsim's contracts) they could consent to arbitration, and equitably estop MCC and Nokia from refusing such consensual arbitration. After considering submissions from Swiss law experts, the district court denied the motion to compel, concluding "that Swiss law discourages, if not prohibits, the joinder of non-parties to an arbitration," and that while Defendants sought to "consent" arbitration, "such consent cannot be effected unilaterally, especially where, as here, it is being employed simply as a way of avoiding an otherwise valid proceeding in this Court." Pet. App. 271a.

D. Defendants Appeal the Denial of Arbitration, But Continue to Litigate in District Court

The Uzans appealed the denial of their arbitration motion. At that time, nine months into litigation, the Uzans for the first time asked the district court to stay further proceedings, pending appeal. Pet. App. 8a; Resp. App. 19a. The district court observed the Uzans' active litigation might well have waived any right to arbitrate. Nonetheless, it addressed and denied their stay motion on the merits. Pet. App. 264a; *see also* Pet. App. 62a n.4; Resp. App. 19a.

The district court ruled that Section 16 of the FAA had no application to the Uzans, who were not parties to the arbitration agreements. Pet. App. 265a. The court concluded that "for this reason alone the appeal is frivolous, and the [stay] motion must be denied." *Id.* In the alternative, the court ruled that it retained discretion to deny a stay "where the appeal is patently frivolous or taken for an obviously improper purpose." *Id.* The court found that "a stay would only serve to advance the very machinations for which defendants have

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that motion as part of an omnibus motion to dismiss on jurisdiction and on the merits. Pet. App. 61a, C.A. App. 670-72. In the meantime, Defendants actively sought discovery, receiving more than 96,000 pages of documents. Pet. App. 117a-118a.

been found in contempt of court." *Id.* The court further denied a discretionary stay. Pet. App. 265a-266a.

While their appeal was pending, the Uzans continued to litigate in the district court. They maintained counterclaims, issued subpoenas, filed motions to compel, and issued deposition requests. *See* Pet. App. 9a, 118a. These efforts followed statements that Defendants intended "to engage totally and move forward" with litigation. Pet. App. 62a, 117a. Despite these promises, Defendants defied repeated orders to produce documents and be deposed, Pet. App. 9a, 57a, 118a-119a, 219a-220a, and never took the promised steps to restore and deposit the collateral. Pet. App. 216a-218a. The court concluded the Uzans' many promises had been shams. Pet. App. 216a; Resp. App. 27a-28a.

E. With No Stay From the Court of Appeals, the District Court Conducts a Trial

After the district court denied a stay, the Uzans asked the court of appeals to stay all litigation. Though it stayed the mounting contempt fines for the Uzans' defiance of the preliminary injunction, Pet. App. 8a n.4, the appellate court declined to stay the district court proceedings. Pet. App. 45a, 63a. On the eve of trial, the Uzans reiterated their "emergency" stay request, but the Second Circuit again issued no stay. Pet. App. 63a. Before proceeding to trial, Judge Rakoff ascertained that the court of appeals was aware of the trial's imminence. He "justifiably relied on the Court of Appeals' failure to grant defendants' proposed stay in making [his] determination to proceed to trial." Pet. App. 64a n.5.

At that point, the Uzans announced that, in supposed obedience to *ex parte* Turkish injunctions they had obtained themselves, they would not attend trial. Resp. App. 32a; Pet. App. 64a, 119a. The district court had already ordered the Uzans to have those self-obtained injunctions withdrawn, because they were obtained solely to interfere with this lawsuit.

Resp. App. 22a; Pet. App. 8a-9a, 218a. The Uzans refused, "profess[ing]" their supposed right as Turkish citizens "to seek the assistance of the Turkish Courts . . . to oppose the jurisdiction of the Courts of the United States . . . ." Resp. App. 32a-33a. Shortly thereafter, the Uzans' injunctions were overturned by the Turkish Supreme Court of Appeals, which found the injunctions "totally lack[ed] authority," were "illegal," and "creat[ed] doubt about the trustworthiness of the [issuing] judge." Resp. App. 26a.

Judge Rakoff conducted a bench trial, relying principally on evidence from the fully contested preliminary injunction hearing. Pet. App. 64a n.6, 119a; Resp. App. 26a. The court also accepted additional written testimony and exhibits, and examined four witnesses. Pet. App. 119a-120a.

F. The Court of Appeals Remands, But Defendants Do Not Seek to Reopen the Trial

On March 7, 2003, after the trial but before any decision or judgment, the court of appeals issued an opinion resolving the Uzans' earlier appeal from the preliminary injunction. Pet. App. 250a. That opinion also remanded the Uzans' purported interlocutory arbitration appeal, which had not yet been briefed. Pet. App. 251a, 263a. MCC and Nokia had moved to dismiss that appeal as unauthorized because the Uzans were not parties to any agreement to arbitrate. The appellate decision denied both the motion to dismiss and the Uzans' stay motion as moot. Pet. App. 263a.

In response to the remand, the district court invited the parties to brief "any issue whatsoever . . . any subject under the sun" that they wanted to raise. C.A. App. 1986; *see* Pet. App. 72a. Judge Rakoff specifically raised the "obvious" question of "whether there is any need to reopen the trial record." C.A. App. 1980. The Uzans briefed six different challenges to jurisdiction, standing, the merits, and their renewed motion to compel arbitration. Pet. App. 72a-73a. They obtained

dismissal of MCC's computer hacking claims. Pet. App. 79a-81a. The Uzans did not, however, ask to reopen the trial, introduce evidence, or conduct a new trial. *See id.* Nor did they contest, at trial or on appeal, any of the evidence that had been introduced, or any of the findings and conclusions based on that evidence. Pet. App. 15a. With no request to set the trial aside, the district court proceeded to consider the evidence and render a decision. Pet. App. 72a.

G. The District Court Judgment

On July 31, 2003 the district court issued a 173-page opinion, deciding all post-remand motions, and making findings and conclusions on the merits. Pet. App. 10a, 68a-247a.

The district court denied the Uzans' renewed motion to compel arbitration. The court noted it was undisputed that the Uzans had no agreement with either Plaintiff, Pet. App. 97a, and that Plaintiffs' claims against the Uzans were "light-years removed" from anything within Telsim's loan agreements. Pet. App. 95a. The court rejected the Uzans' equitable argument for arbitration, finding that: MCC and Nokia had "directly su[ed] the real culprits, the Uzans," for fraud; the Uzans, with unclean hands, were undeserving of equitable relief; and the Telsim loan agreements were governed by Swiss law, "which strictly enforces privity of contract and generally prohibits non-parties from seeking to invoke contractual terms on their behalf." Pet. App. 97a-98a.

The court held the Uzans liable on Plaintiffs' state law claims of fraud, civil conspiracy, and constructive trust. Pet. App. 11a, 235a-249a. It awarded compensatory and punitive damages, injunctive relief, and constructive trusts. Pet. App. 11a-12a, 241a-245a. The Uzans have not complied with the injunctive relief, and are now subject to arrest for contempt. Pet. App. 12a, 246a.

H. Defendants' Frustration of the Judgment

Throughout the litigation, the Uzans have stood in contempt rather than reveal assets or bring them within judicial reach. They never complied with the preliminary injunction to deposit the collateral, and are subject to arrest for contempt. Pet. App. 105a, 216a-218a, 246a. They defied the court's discovery orders, leaving the court unable to assess their wealth or the magnitude of their fraud. Pet. App. 70a, 118a-119a, 219a-220a; Resp. App. 31a. They refused to post any bond. Pet. App. 12a; Resp. App. 28a. In related English proceedings, the Uzans incurred jail sentences rather than disclose assets. Pet. App. 221a-228a. Cem Uzan and Aysegul Akay remain subject to such imprisonment orders.

Federal Rule of Civil Procedure 69(a) allows judgment creditors to obtain discovery in aid of execution. The Uzans have defied orders to provide such discovery. Their trial counsel recently stated that none of the Defendants (individual or corporate) would appear for post-judgment depositions. The Defendants announced more than once prior to judgment that they would "oppose all efforts to enforce any judgment." Resp. App. 33a; C.A. App. 1985-86. The court of appeals noted Defendants' pattern of diverting and concealing assets is designed to frustrate any judgment against them, creating a "dwindling prospect" of Plaintiffs' being able to enforce their judgment. Pet. App. 29a-30a.

I. Proceedings on Final Appeal

The Uzans appealed the final judgment. An appellate motions panel initially dismissed the Uzans' appeals under the fugitive disentitlement doctrine, which allows dismissal of appeals by parties whose flight prevents enforcement of the judgment. Pet. App. 53a-54a. The motions panel later vacated that order and referred the appeals to a merits panel. Pet. 49a-50a. MCC and Nokia renewed their disentitlement motion before the merits panel. Pet. App. 2a n.1.

Though it remanded some remedies determinations, the court of appeals unanimously affirmed the judgment in all respects presented here. Pet. App. 45a. The court denied Plaintiffs' disentitlement motion, noting that it had undisputed discretion to dismiss, but it declined to exercise that discretion. Pet. App. 47a-48a.

The court of appeals concluded "the parties did not agree to arbitrate," because the Uzans are not signatories to the agreements on which they rely. Pet. App. 16a. Addressing the Uzans' equitable estoppel argument, the court noted that 9 U.S.C. § 206, under which the Uzans moved, permits arbitration "in accordance with the agreement," which in this case is governed by Swiss law. Pet. App. 18a. Honoring the parties' choice of law, the court said, "is necessary to ensure uniform interpretation and enforcement of [the] agreement and to avoid forum shopping," especially in the transnational context governed by the Convention. Pet App. 19a.

After oral argument, the court of appeals ordered supplemental briefing and expert affidavits on Swiss law and choice of law. Pet. App. 19a. Based on those submissions, the court of appeals concluded "that under Swiss law, defendants, as nonsignatories to the agreements, *may not* invoke the arbitration clauses contained in those agreements." Pet. App. 20a. Even the Uzans' Swiss law expert could not say Swiss law allowed a nonsignatory to compel arbitration. Pet. App. 21a-22a. Addressing the Uzans' asserted "principle of good faith," the court of appeals noted that such a principle, even if operable, did not require arbitration where the "*defendants* repeatedly acted in bad faith." Pet. App. 22a.

The court of appeals also rejected the Uzans' contention that their purported interlocutory appeal divested the district court's jurisdiction to proceed to trial. Pet. App. 24a-25a. The court acknowledged a circuit split on the issue of whether a nonfrivolous appeal from a denial of arbitration divests the district court's jurisdiction. Pet. App. 25a. The court noted,

however, a key difference between this case and those finding divestiture: in the latter cases, the Seventh and Eleventh Circuits had "*granted a stay* of the district court proceedings pending appeal." *Id.* "*In no case* has a Court of Appeals granted the relief that [the Uzans] now seek—undoing a trial because the district court lacked jurisdiction to proceed after an appeal from an order denying arbitration." *Id.*

The court of appeals denied rehearing. No judge requested an en banc vote. Pet. App. 295a.

REASONS FOR DENYING THE PETITION

I. The Divestiture of Jurisdiction Issue Does Not Warrant This Court's Review

A. There Is No Conflict Where, As Here, the District Court Found the Appeal Frivolous and the Court of Appeals Issued No Stay

Defendants argue the circuits are split on whether a district court may proceed during a nonfrivolous interlocutory appeal. But there is no split among the circuits on the facts presented here, where the district court found the appeal frivolous and the court of appeals refused to issue a stay. As explained in the cases that the Uzans claim are in conflict with the result here, "[e]ither the court of appeals or the district court may declare that the appeal is frivolous, and if it is the district court may carry on with the case." *Bradford-Scott Data Corp. v. Physician Computer Network*, 128 F.3d 504, 506 (7th Cir. 1997). "If the district court denies the motion to stay, then the appellant may file a motion to stay in [the court of appeals.]" *Blinco v. Green Tree Serv'g*, 366 F.3d 1249, 1253 (11th Cir. 2004). If the appellate court determines the appeal is non-frivolous, it should grant a stay. *Id.* If not, litigation may proceed.

That is exactly what happened here. The district court denied the Uzans' stay motion, finding that because they were

not parties to any agreement to arbitrate, their appeal was frivolous and they could not invoke FAA § 16. Pet. App. 265a. The Uzans turned to the court of appeals, twice asking on an emergency basis to stay the trial. The court of appeals declined to issue a stay. Pet. App. 45a, 63a-64a & n.5.[4] In these circumstances, the courts of appeals all agree that the district court may go forward during the appeal. *See Bradford-Scott*, 128 F.3d at 506; *Blinco*, 366 F.3d at 1252; *see also Britton v. Co-Op Banking Group*, 916 F.2d 1405, 1412 & n.8 (9th Cir. 1990); *In re Salomon Inc. Shareholders Deriv. Lit.*, 68 F.3d 554, 556, 561 (2d Cir. 1995) (affirming district court decision to proceed to trial).

The D.C. Circuit does not disagree. The unpublished case the Uzans cite, *Bombardier Corp. v. Nat'l R.R. Pass. Corp.*, No. 02-7125, 2002 WL 31818924 (D.C. Cir. Dec. 12, 2002),[5] follows *Bradford-Scott*, and is conditioned on the appeal being non-frivolous. Furthermore, in the D.C. Circuit, as elsewhere, an interlocutory appeal under FAA § 16 is unavailable for litigants who are not parties to an agreement to arbitrate. *DSMC Inc. v. Convera Corp.*, 349 F.3d 679, 684 (D.C. Cir.

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[4] The Uzans rely on a statement in the *second* appeal decision that their arbitration appeal was not frivolous. Pet. App. 23a. That statement came two years after a stay was sought and refused. By that time, the appeal was no longer interlocutory, and a stay was no longer the issue. *See* Pet. App. 63a-64a. That appeal was from final judgment; the question was whether to undo the results of a completed trial. Pet. App. 25a. The questions of frivolousness and whether to grant a stay were squarely presented to the first panel, which remanded the interlocutory appeal without deciding it. That panel refused to grant a stay. Pet. App. 45a, 63a-64a. A different panel's later hindsight aside does not alter the fact that the court of appeals considered the Uzans' stay request at the time, and refused to disturb the district court's decision. Pet. App. 45a, 63a.

[5] Unpublished orders from the D.C. Circuit are not precedential. D.C. Cir. R. 28(c). The *Bombardier* appeal was later dismissed for lack of jurisdiction under FAA § 16. 330 F.3d 250, 253-54 (D.C. Cir. 2003).

2003). Where there is no right of appeal, there can be no divestiture of jurisdiction.

In *Bradford-Scott* and *Blinco*, the appellate courts *granted* a stay. *Bradford-Scott*, 128 F.3d at 507; *Blinco*, 366 F.3d at 1253; *see* Pet. App. 25a. In the cases supposedly in conflict, the courts of appeals *denied* a stay. *Salomon*, 68 F.3d at 557; *Britton*, 916 F.2d at 1412 n.8. Here, no stay was granted. Pet. App. 45a, 63a. Thus, the cases claimed to be in conflict can be reconciled based on this factual distinction. *See* Pet. App. 25a. Although *Bombardier* denied a stay as unnecessary because divestiture was automatic, its ruling was restricted to a nonfrivolous appeal. *Bombardier*, 2002 WL 31818924, at *1. Here, the district court found the appeal frivolous, Pet. App. 265a, and the court of appeals did not disturb that decision. Pet. 45a, 63a. "*In no case* has a Court of Appeals granted the relief that defendants now seek—undoing a trial because the district court [assertedly] lacked jurisdiction" at the time. Pet. App. 25a. This case is unique, and falls outside any circuit conflict concerning divestiture.

B. This Case Is a Poor Vehicle to Decide Whether the District Court Had Jurisdiction

Putting aside the Uzans' effort to recast this case to fit it into an inapplicable circuit conflict, this case would be a poor vehicle for review, because the Court could not reach the issue or grant relief on these facts. The Uzans want the judgment undone because they claim the district court lacked jurisdiction at the time of trial. But the district court undisputedly reacquired jurisdiction long before judgment. Thereafter, the Uzans never asked to reopen the trial or conduct a new one. They have waived such relief. Finally, the Uzans' question is premised on a nonfrivolous appeal under FAA § 16. That premise does not exist here, because the Uzans, who are not parties to any agreement to arbitrate, may not invoke § 16 to obtain an interlocutory appeal.

1. The District Court Undisputedly Had Jurisdiction When It Rendered Judgment

The Uzans challenge the district court's jurisdiction at the time of *trial*, while their interlocutory arbitration appeal was pending. But what is before the Court for review is the *judgment*. *See Chevron USA v. Nat'l Res. Def. Council*, 467 U.S. 837, 842 (1984) (Court reviews judgments, not opinions). It is undisputed that the Second Circuit had remanded the case and the district court therefore had jurisdiction when it rendered the judgment here. Pet. App. 64a n.6, 248a.

The Uzans argue only that the district court lost jurisdiction during their interlocutory appeal. But that appeal ended, and the case was remanded, on March 7, 2003. Pet. App. 9a-10a, 251a, 263a. The district court's jurisdiction, if it had ever been divested, was undisputedly restored by the remand. Thus, the court had jurisdiction when it rendered judgment on July 31, 2003. Pet. App. 64a n.6, 248a; *see Grubbs v. Gen. Elec. Credit Corp.*, 405 U.S. 699, 700, 705 (1972) (jurisdiction judged at time of judgment).

2. The Defendants Waived Relief

Defendants have waived the relief they seek. After the remand, the district court asked "whether there is any need to reopen the trial record." C.A. App. 1980. The court then invited the parties to submit briefs on "any issue whatsoever . . . any subject under the sun" they wanted to raise. C.A. App. 1986. Despite this invitation, the Uzans never asked to reopen the trial record. They briefed challenges to jurisdiction, standing, the merits, and arbitration, and succeeded in dismissing four claims against them. Pet. App. 72a-73a, 79a-81a. But they never asked to re-do the trial. *Id.* Having passed up the opportunity in the district court, the Uzans have waived such relief.

The Uzans would not have attended trial in any event. At the time, they claimed to be obeying Turkish injunctions they

had obtained themselves, purporting to enjoin themselves from defending (and Plaintiffs from prosecuting) this lawsuit. Resp. App. 25a, 32a-33a; Pet. App. 64a; 119a.[6] This case thus does not clearly present the divestiture question, because the Uzans would have been absent anyway for their own reason.[7] To consider undoing the trial, where such relief was waived and Petitioners did not attend for a different reason, would waste this Court's resources.

3. The Premise of the Question, a Non-Frivolous Appeal Under FAA Section 16, Is Not Presented Here

Finally, the premise of the first question—"a non-frivolous appeal pursuant to 9 U.S.C. § 16(a)"—is not clearly presented here. The Uzans were not authorized to take an interlocutory appeal under § 16, because they were not parties to any agreement to arbitrate. Numerous courts of appeals have held that a litigant who is not a party to an agreement to arbitrate cannot invoke FAA § 16 to obtain an interlocutory appeal. *Sierra Rutile Ltd. v. Katz*, 937 F.2d 743, 748 (2d Cir. 1991); *Adams v. Georgia Gulf Corp.*, 237 F.3d 538, 540-41 (5th Cir. 2001); *IDS Life Ins. Co. v. SunAmerica, Inc.*, 103 F.3d 524, 529-30 (7th Cir. 1996); *DSMC Inc. v. Convera Corp.*, 349 F.3d 679, 684-85 (D.C. Cir. 2003).

This preliminary question would need to be resolved before the Court could reach the question presented. The court of appeals never decided it. Plaintiffs moved to dismiss the Uzans' purported § 16 appeal, but the Second Circuit remanded the appeal before briefing, and denied the motion to dismiss

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[6] The Uzans' injunctions were soon overturned by the Turkish Supreme Court of Appeals, which ruled the injunctions "totally lack[ed] authority," were "illegal," "impossible and inappropriate," and "creat[ed] doubt about the trustworthiness of the [issuing] judge." Resp. App. 26a.

[7] By the same token, granting the Uzans relief would only lead to the same result: a trial on remand they will not attend. The Uzans have made clear they will attend no trial.

as moot. Pet. App. 263a. This threshold issue determines whether Petitioners' appeal fell within FAA § 16 at all, and thus stands as an obstacle to reaching the question presented. By assuming the premise of their question, the Uzans are asking this Court to decide the effect of a § 16 interlocutory appeal when it is far from clear they had one.[8]

There is good reason to limit § 16 appeals to those who have an agreement to arbitrate. Interlocutory appeals are disruptive for trial courts, appellate courts, and parties, and are therefore generally prohibited. *Gulfstream Aerospace Corp. v. Mayacamas Corp.*, 485 U.S. 271, 275 & n.7 (1988). The FAA creates an exception, and allows immediate appeals from denials of arbitration, to protect parties who have *agreed* to arbitrate. To extend an interlocutory appeal to *nonparties* to arbitration agreements, however, would invite abuse. Any defendant could then delay litigation by filing a motion to arbitrate, followed by an interlocutory appeal, whether or not he had an arbitration agreement. *See, e.g.*, *Britton*, 916 F.2d at 1412. Arbitration agreements are common enough that one will often be nearby, an inviting object for defendants who want to stall proceedings. The FAA, however, "does not merely require that there be a written agreement somewhere in the picture. It requires that the motion to compel be based on an alleged failure to arbitrate under that written agreement." *DSMC*, 349 F.3d at 683.[9]

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[8] The court of appeals' hindsight statement in the second appeal that the first appeal "was not frivolous" (Pet. App. 23a) did not address whether that appeal had been *authorized*. Because the court was considering a final merits appeal, it did not have before it Plaintiffs' motion to dismiss Defendants' interlocutory appeal, which was presented to but not decided by the earlier Second Circuit panel. Pet. App. 263a.

[9] Such abuse of "nearby" arbitration agreements is shown in the endorsement of the Petition by Respondents Antonio Luna Betancourt and the three corporate defendants. These Defendants, who also claim to be entitled to arbitrate under the Telsim loan contracts, have no agreements with MCC or Nokia. The corporate defendants are at most mere stock-

Restricting interlocutory appeals under § 16 to signatories has the virtue of creating a bright-line jurisdictional rule. *See DSMC*, 349 F.3d at 683. Allowing nonsignatories seeking arbitration under equitable theories to invoke the FAA for appeals and attendant stays would require courts to become enmeshed in the merits to determine jurisdictional issues—"an unattractive prospect." *Id.* at 684.

C. The Court of Appeals Decision Was Correct

The Second Circuit's decision not to disturb the trial result was correct. The courts of appeals agree that if the district court finds the appeal frivolous, it may move forward. A dissatisfied party may seek relief in the court of appeals. If that court finds the appeal nonfrivolous, it may issue a stay; otherwise, litigation should proceed. Section I.A, *supra*; *Blinco*, 366 F.3d at 1253. This mechanical process supplies a bright-line test for district courts to apply in deciding whether to go forward. *See DSMC*, 349 F.3d at 683-84.

This Court has approved a similar procedure in the immunity and Double Jeopardy contexts. Parties denied those protections are entitled to immediate appeals. *Mitchell v. Forsyth*, 472 U.S. 511, 524-30 (1985); *Abney v. United States*, 431 U.S. 651, 659-62 (1977). Nonetheless, stays are not automatic, because such a rule would be subject to abuse. *See Abney*, 431 U.S. at 662 n.8, 663. Instead, appellate courts have developed a rule of concurrent jurisdiction, whereby a district court may proceed to trial if it concludes the immunity or double jeopardy contention is frivolous. *See, e.g., United States v. Salerno*, 868 F.2d 524, 539 (2d Cir. 1989). A court

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holders in Telsim. Luna is an Uzan confederate who held no Telsim shares and no known Telsim position. Pet. App. 203a-208a. These persons have no involvement in claims between Telsim, MCC and Nokia. Instead, they participated in diverting the loan revenues and diluting Plaintiffs' collateral. That these Defendants claim to be able to invoke Telsim's arbitration clauses, and to demand that all proceedings stop during an interlocutory appeal, demonstrates the dangerous absurdity of Petitioners' arguments.

of-appeals that disagrees can grant a stay. *See, e.g., Apostol v. Gallion*, 870 F.2d 1335, 1339 (7th Cir. 1989). This Court has approved the practice, which "enables the district court to retain jurisdiction pending summary disposition of the appeal, and thereby minimizes disruption of the ongoing proceedings." *Behrens v. Pelletier*, 516 U.S. 299, 310-11 (1996).

Here the district court found the arbitration appeal frivolous. Pet. App. 265a. The Uzans twice sought emergency relief from the appellate court, but that court refused to issue a stay. Pet. App. 45a, 63a-64a. (The court had already twice refused to stay the preliminary injunction, based on the same arbitrability arguments.) In going forward with trial, the district court relied on the appellate court's refusal to stay. Pet. App. 64a n.5. In these circumstances, the district court was correct to proceed, and the appellate court was correct not to discard the trial result. Pet. App. 25a. The Petition presents no compelling need for review.[10]

II. The Use of Foreign Law Chosen By the Parties, in an International Contract Governed by the Convention, Does Not Require This Court's Review

A. There Is No Circuit Split On the Effect of a Foreign Choice of Law Clause in an International Contract Governed by the Convention and Chapter 2 of the FAA

The Uzans' second question asks whether the arbitrability of a dispute involving an international contract covered by FAA Chapter 2 is governed by the foreign law chosen in the contract rather than American law. Not one of the cases set forth in the Petition, however, decided that question. Instead,

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[10] The Uzans' suggestion that review is important to head off an "acute" risk of forum shopping (Pet. 19) is far-fetched. It is facially implausible that parties would change fora based on a perceived likelihood of an appellate stay, *if* the district court were to deny arbitration, find the arbitration contention nonfrivolous, yet deny a stay pending appeal.

Petitioners' cases all concern domestic disputes involving contracts covered by FAA Chapter 1, not Chapter 2. None of their cases address a dispute like this one, concerning an international contract governed by the Convention, FAA Chapter 2, and foreign choice of law.

The distinction is important. Prior to 1970, all disputes about arbitrability were governed by what is now Chapter 1 of the FAA, 9 U.S.C. §§ 1-16. Enacted in 1925, the FAA was intended to place arbitration agreements "upon the same footing as other contracts." *Volt Info. Scis. v. Bd. of Trustees*, 489 U.S. 468, 473 (1989). In 1970, however, the United States joined the Convention, 21 U.S.T. 2517, 330 U.N.T.S.3, which was intended "to unify the standards by which agreements to arbitrate are observed and arbitral awards are enforced in the signatory countries." *Scherck v. Alberto-Culver Co.*, 417 U.S. 506, 520 n.15 (1974). International contracts to arbitrate involve "special considerations and policies significantly different from those found" in domestic agreements, including chiefly the need for uniformity and predictability of the law that will govern disputes. *Id.* at 515.

Chapter 2 of the FAA (9 U.S.C. §§ 201-208) implements the Convention. While domestic contracts "entirely between citizens of the United States" continue to be governed by Chapter 1, contracts involving persons from other countries are governed by the Convention and Chapter 2. § 202. Chapter 1 continues to apply only to the extent that it does not conflict with the Convention. § 208.

Although the Convention and the FAA assure enforcement of agreements to arbitrate, they do not confer a right to compel arbitration of any dispute at any time. *Volt Info.*, 489 U.S. at 474-75. Arbitration is a creature of contract, *AT&T Techs. v. Comm. Workers of Am.*, 475 U.S. 643, 748 (1986), and the FAA "does not require parties to arbitrate when they have not agreed to do so." *EEOC v. Waffle House*, 534 U.S. 279, 293 (2002). In particular, the Convention contains specific lan-

guage requiring the existence of an "agreement in writing," which must consist of "an arbitral clause in a contract or an arbitration agreement, signed by the parties or contained in an exchange of letters or telegrams." Art. II(2).

The Petition entirely overlooks the Convention and Chapter 2. Instead, the Uzans ask this Court to resolve an asserted circuit split in cases decided exclusively under Chapter 1. Pet. 22, 24. Every one of those cases concerns a choice-of-law clause incorporating American state law, and decides whether that state law displaces a default rule under Chapter 1. They are all American disputes.[11] None of those cases is like this one, where the dispute is international, governed by the Convention and FAA Chapter 2, and the contract invokes foreign law. Moreover, in every case the Uzans cite, both parties had undisputedly signed an agreement in writing to arbitrate. None of those cases presents the situation here, where the parties had *no* agreement, of any kind, in writing or otherwise. Pet. App. 16a, 97a, 265a, 271a. The Petition cites no case, much less any conflict, concerning whether there was an "agreement in writing" to arbitrate under the Convention, or whether a nonsignatory could invoke someone else's contract to avail himself of an arbitration clause. Pet. 21-25.

The conflict urged by the Uzans involves an American federalism issue applicable only to domestic arbitrations:

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[11] *See Ekstrom v. Value Health*, 68 F.3d 1391, 1393 (D.C. Cir. 1995) (American parties, Connecticut law); *Security Ins. Co. v. TIG Ins. Co.*, 360 F.3d 322, 323, 324 (2d Cir. 2004) (American parties, California law), *cert. denied*, 125 S. Ct. 90 (2004); *Roadway Package Sys. v. Kayser*, 257 F.3d 287, 288, (3d Cir. 2001) (American parties, Pennsylvania law); *Porter Hayden Co. v. Century Indem. Co.*, 136 F.3d 380, 381-82 (4th Cir. 1998) (American parties, Maryland law); *Action Indus. v. USF&G*, 358 F.3d 337, 339, 341 n.13 (5th Cir. 2004) (American parties, Tennessee law); *Ferro Corp. v. Garrison Indus.*, 142 F.3d 926, 927-28 (6th Cir. 1998) (American parties, Ohio law); *Wolsey, Ltd. v. Foodmaker, Inc.*, 144 F.3d 1205, 1206, 1210 (9th Cir. 1998) (Hong Kong franchisee vs. American franchisor; federal and California claims; California law).

whether, and under what circumstances, a state arbitration rule can displace a federal one under FAA Chapter 1.[12] The Uzans argue that a federal "substantive law of arbitrability," arising from a body of this Court's decisions under FAA Chapter 1, supplies default rules of decision that trump conflicting state laws. Pet. 22, 23 (citing *Moses H. Cone Mem. Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983), and progeny). That body of law preempts American state laws under the Supremacy Clause. *See Southland Corp. v. Keating*, 465 U.S. 1, 12-15 (1984). The Uzans ask this Court to resolve a claimed circuit split on whether to apply federal or state arbitrability rules, by reaffirming that federal rules presumptively apply, and trump state law chosen in general choice-of-law clauses. Pet. 22-24.[13]

That issue is not presented in this case or any international arbitration. The question here is whether the lower courts were correct to apply *Swiss* law to decide whether a *nonparty* to international contracts governed by Swiss law could invoke those contracts to compel arbitration under the Convention. Pet. App. 17a-19a. Swiss law, unlike American state law, is

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[12] *See Ekstrom*, 68 F.3d at 1393 (Connecticut limitations period for petitioning to vacate arbitral award); *Security Ins.*, 360 F.3d at 324 (whether California law applies to allow stay of arbitration); *Wolsey*, 144 F.3d at 1210 (same); *Roadway*, 257 F.3d at 291 (Pennsylvania standards for vacatur); *Porter Hayden*, 136 F.3d at 381, 382 (Maryland laches and limitations defenses); *Action Indus.* 358 F.3d at 341 (Tennessee vacatur standards); *Ferro*, 142 F.3d at 931-32 (Ohio law on whether fraudulent inducement claims are determined by court or arbitrator).

[13] The Uzans also imply that if federal law applies, they win, because the "court of appeals did not dispute" that agents of a company could invoke the company's contractual arbitration rights. Pet. 22 n.5 (citing *Campaniello Imports v. Saporiti Italia*, 117 F.3d 655, 668 (2d Cir. 1997)). On the contrary—Defendants' agency theory of arbitrability was *waived*, not conceded. The court of appeals "did not dispute" the theory only because it *did not consider it*, since it was not raised in the district court. Pet. App. 16a.

not preempted by American federal law of arbitrability. In the international context, the treaty governing arbitration (the Convention), and its implementing statute (FAA Chapter 2) are the supreme law of the land. U.S. Const. art. VI, cl. 2. The facts of this case do not present the question on which the circuit conflict is claimed.

B. The Court of Appeals Correctly Chose Swiss Law

There is also nothing in the Second Circuit's choice of law analysis that requires this Court's review. The Uzans moved to compel arbitration under 9 U.S.C. § 206, which authorizes a court to "direct that arbitration be held in accordance with the agreement . . . ." [14] The first task under § 206 is determining "whether the parties agreed to arbitrate." Pet. App. 16a. Because § 206 implements the Convention, the court had to determine whether there was an "agreement in writing" to arbitrate, as that term is defined in Article II(2)—*i.e.*, whether there was "an arbitral clause in a contract or an arbitration agreement, *signed by the parties* or contained in an exchange of letters or telegrams." *Id.*; *see Kahn Lucas Lancaster, Inc. v. Lark Int'l*, 186 F.3d 210, 215 (2d Cir. 1999). Here, the court only had to observe what is undisputed: the defendants "were not parties to any agreement to arbitrate with plaintiffs." Pet. App. 15a. There was certainly no "agreement in writing" that was "signed by the parties" within the meaning of the Convention. This conclusion alone is sufficient to uphold the judgment. *Kahn Lucas*, 186 F.3d at 215-218.

Moreover, Article II(3) of the Convention authorizes compulsion of arbitration only when "the parties" to the "action" (*i.e.*, the litigation) "have made an agreement within the meaning of this article." Courts applying the Convention, a treaty among sovereign nations, must construe it strictly, re-

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[14] Contrary to the Petition (at 7), the Uzans moved to compel only under Section 206, not Section 4, of the FAA. C.A. App. 677, 695-705.

fraining from adding to or altering its terms.[15] Thus, the district court could compel arbitration only if MCC, Nokia and the Uzans had a signed, written agreement to arbitrate. Art. II(2). They plainly did not. Pet. App. 15a, 16a.

The court of appeals went on to consider the district court's rationale: that Defendants could not invoke an agreement to which they were not parties, under the Swiss law governing the agreement. The court correctly noted that § 206 permits a court to order arbitration only "in accordance with the agreement." Pet. App. 18a. The agreement of course fundamentally includes its choice of law clause. The court concluded, fairly, that "if defendants wish to invoke the arbitration clauses in the agreements at issue, they must also accept the Swiss choice-of-law clauses that govern those agreements." Pet. App. 19a.

Defendants claim that honoring international choice of law clauses will threaten uniformity in the law, and encourage forum-shopping. Pet. 25. In the context of international agreements governed by treaty, these concerns are precisely backward. If the law of the forum governed these questions, then a litigant would have incentive to ignore contractually chosen law, and find a country whose forum law favored its view of arbitrability. *See Scherck*, 417 U.S. at 516-17. Parties would be frustrated in their ability to choose the law that governs their contract.

As the court of appeals explained, "applying the parties' choice of law is the only way to ensure uniform application of arbitration clauses within the numerous countries that have

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[15] *See, e.g., In re The Amiable Isabella*, 6 Wheat. (19 U.S.) 1, 71 (1821) (Story, J.) ("[T]o alter, amend, or add to any treaty, by inserting any clause, whether small or great, important or trivial, would be, on our part, an usurpation of power, and not an exercise of judicial functions."); *Chan v. Korean Air Lines*, 490 U.S. 122, 134 (1989) ("We must thus be governed by the text—solemnly adopted by the governments of many separate nations . . . .").

signed the New York Convention." Pet. App. 19a. In the context of the Convention, this Court's admonition that courts not "insist on a parochial concept that all disputes must be resolved under our laws," *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth*, 473 U.S. 614, 629 (1985) (quoting *The Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 9 (1972)), applies as much to arbitrability determinations as it does to substantive law. "Furthermore, respecting the parties' choice of law is fully consistent with the purposes of the FAA." Pet. App. 19a (quoting *Volt Info.*).

The court of appeals' ruling was fully consistent with this Court's decisions stressing the importance of choice of law clauses in international contracts. Choice of law clauses are "an almost indispensable precondition to achievement of the orderliness and predictability essential to any international business transaction." *Scherck*, 417 U.S. at 516; *see also Mitsubishi*, 473 U.S. at 629. Refusal to honor the parties' choice would disrupt predictability and invite forum shopping. *Scherck*, 417 U.S. at 516-17.

The Uzans' uniformity argument assumes the wrong frame of reference. They argue federal substantive law gives uniformity and predictability over foreign law. Pet. 25. But in the international context, to apply federal law would mean applying American law—one nation's common law, among the 134 nations that have signed the Convention. Such "parochial" application of forum law has been rightly rejected by this Court. While federal law may be convenient, American courts are up to the task of considering foreign law chosen by parties to international contracts. *See* Fed. R. Civ. P. 44.1. The lower courts did so here quite capably. Pet. App. 19a-22a, 98a-99a. Parties should not complain about having to provide evidence of foreign law (Pet. 25) where that law was chosen in the contract they try to invoke.

Finally, the Uzans now argue that Swiss arbitrators should have decided whether the parties had an agreement to arbi-

trate. Pet. 26. But Defendants told the court of appeals (correctly) that this was a question for the court. Pet. App. 23a n.11. There was no error, *Mitsubishi*, 473 U.S. at 626; *see also First Options v. Kaplan*, 514 U.S. 938, 944-47 (1995); but if there were, it would be invited.[16]

The courts below concluded that under Swiss law, nonparties may not invoke others' agreements to compel arbitration. Defendants' Swiss law expert did not contend otherwise. Pet. App. 19a-22a. This Court does not use certiorari to review lower court determinations of foreign law. Nothing in the court of appeals' analysis calls for this Court's review.

III. The Court Should Decline to Grant Review For Fugitives Who Will Not Obey the Judgment

This Court should also decline to exercise its discretionary certiorari jurisdiction because Petitioners do not recognize U.S. jurisdiction over them, and have refused to respond to the judgment. The Court should not grant review where its eventual decision would be effectively advisory, because the Uzans will obey it only if they win.

Under the doctrine of fugitive disentitlement, appellate courts, including this Court, may decline to hear appeals from parties whose flight beyond reach allows them to choose whether or not to obey the judgment. *E.g.*, *Degen v. United*

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[16] Defendants cite *China Minmetals Mat'ls Imp. & Exp. Co. v. Chi Mei Corp.*, 334 F.3d 274, 287 (3d Cir. 2003) for the proposition that arbitrators should determine arbitrability, under the principle of "competence-competence." Pet. 26. Although *China Minmetals* discussed that principle, its holding went the other way: under *First Options*, the U.S. court had to decide independently whether the parties had agreed to arbitrate. 334 F.3d at 287-89; *see also id.* at 281 (discussing Convention Art. II(2)).

Defendants' claim that Swiss law "specifies that arbitrators . . . must decide questions of arbitrability in the first instance" (Pet. 26) is simply wrong. The Swiss statute they cite, like American law, requires that the *court* first determine whether "the parties have concluded an arbitration agreement." Pet. App. 300a; *see* Pet. App. 23a n.11.

States, 517 U.S. 820, 824 (1996). A fugitive need not flee after judgment; he may constructively flee by refusing to return. *United States v. Barnette*, 129 F.3d 1179, 1184 (11th Cir. 1997); *see Degen*, 517 U.S. at 822, 823, 826. Such refusal to submit to the Court's justice "disentitles [fugitives] to call upon the resources of the Court for determination of [their] claims." *Degen*, 517 U.S. at 824. The principles animating the disentitlement doctrine are concern for enforceability of judgments, *id.*, and the fairness and efficiency of denying review to those who "will respond to a judgment only if it is favorable." *Empire Blue Cross & Blue Shield v. Finkelstein*, 111 F.3d 278, 282 (2d Cir. 1997); Pet. App. 48a; *see also Pesin v. Rodriguez*, 244 F.3d 1250, 1253 (11th Cir. 2001); *Barnette*, 129 F.3d at 1183, 1985; *Goya Foods v. Unanue-Casal*, 275 F.3d 124, 129 (1st Cir. 2001).

The same principle—that the Court should not offer its processes to those who will not respect its judgment—even more strongly supports denying certiorari review. Certiorari review is purely discretionary. The Court need not apply disentitlement or any other doctrine to deny review.[17] It may simply consider the equities along with the other factors it considers in deciding whether to exercise its discretion.

Here, the Uzans have openly denied the authority of U.S. courts over them. Resp. App. 32a-33a. They have declared and demonstrated that they will frustrate any judgment against them. Resp. App. 33a; C.A. App. 1985-86[18]; Resp.

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[17] The court of appeals acknowledged its discretion to dismiss the Uzans' appeals, but chose not to do so. Pet. App. 48a. That court, however, was in a different position than this Court. Its jurisdiction is mandatory; it had to decide whether to dismiss an appeal as of right.

[18] Defendants' counsel told the district court: "Should this court ultimately enter judgment in this case, the defendants also intend to resist every way they can the foreign enforcement of those matters because they do not believe this court does have the kind of jurisdiction necessary to enter those judgments in an enforceable way." C.A. App. 1985-86.

App. 21a-24a; Statement of the Case Section H, *supra*. They have defied repeated orders, before and after judgment, to disclose, restore, or deposit assets, preferring to incur jail sentences rather than do anything that might aid enforcement. Pet. App. 29a-30a, 216a-228a, 245a-246a; Resp. App. 8a-16a, 27a-28a, 31a n.2. Now they seek this Court's review from hiding places abroad, where they may continue to decide for themselves whether to respond to the judgment. The longer they remain beyond reach, the more they are able to continue to conceal, launder, and dissipate yet-undiscovered assets. Pet. App. 29a-30a, 198a-204a.

This Court should not make its discretionary review available to such litigants. "Heads I win, tails you'll never find me" is not acceptable from those who invoke this Court's jurisdiction. *Cf. Antonio-Martinez v. INS*, 317 F.3d 1089, 1093 (9th Cir. 2003). The Court should conserve its resources for cases where its judgment will be obeyed.

CONCLUSION

For the foregoing reasons, the Court should deny the Petition.

Respectfully submitted,

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Counsel for Respondent Motorola Credit Corporation

APPENDICES

APPENDIX A

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

No. 02 Civ. 666 (JSR)

MOTOROLA CREDIT CORPORATION and NOKIA CORPORATION,
Plaintiffs,

v.

KEMAL UZAN, *et al.*,
Defendants.

ORDER

JED S. RAKOFF, U.S.D.J.

By telephonic application at 2:00 p.m. today, the defendants moved under Rule 8, Fed. R. App. P., to stay until May 28, 2002 the provision of the Court's Order of May 9, 2002 requiring the deposit of the shares of stock of Telsim Mobil Telekomunikayson Hizmetleri A.S ("Telsim") held by defendant Standart Telekomunikayson Bilgisayar Hizmetleri A.S ("Standart") into this Court's registry by no later than May 24, 2002. The Court, after hearing argument, denied the application, finding that the defendants had not met any of the legal requirements for such a stay. *See Rodriguez v. Debuono*, 175 F.3d 227, 235 (2d Cir. 1999). While the Court might, nonetheless, have accommodated a short adjournment of the stock transfer if defendants were proceeding in good faith, plaintiffs' counsel brought to the Court's attention, and defendants' counsel did not dispute, that the defendants have recently attempted to certify with Turkish authorities the resolutions passed at the January 4, 2002 Telsim shareholder meeting, in apparent contempt of provisions 2, 3 and 4, of the

Court's Order of May 9, 2002 (provisions as to which no stay had been sought from the Court). Additionally, plaintiff's counsel informed the Court of information suggesting that the defendants continue to attempt to misuse the Turkish criminal process for extortionate ends. Accordingly, the defendants' application for a stay pursuant to Rule 8, Fed. R. App. P., is hereby denied in all respects.

So ORDERED.

/s/ JED S. RAKOFF
Jed S. Rakoff, U.S.D.J.

Dated: New York, New York
May 21, 2002

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

[Filed May 22, 2002]

No. 02 CV 0666 (JSR)

MOTOROLA CREDIT CORPORATION and
NOKIA CORPORATION,

v.

KEMAL UZAN, *et al.*,

MOTION INFORMATION FORM

Motion for: EMERGENCY PARTIAL STAY OF PRELIMINARY INJUNCTION ORDER PENDING EXPEDITED APPEAL

MOTION BY: (*Name, address and sel mo. Of law form and of attorney in charge of case*)

OPPOSING COUNSEL: (*Name, address and sel. Mo. Of law firm and attorney in charge of case*)

SEE ATTACHED PAPER

Has counsel of opposing counsel:

A. been sought? ☒ Yes ☐ No

B. been obtained? ☐ Yes ☒ No

Has service been affected? ☒ Yes ☐ No

Is oral argument desired? ☒ Yes ☐ No

Requested return date: May 23, 2002

(See Second Circuit Rule 27(b).)

Has argument date of appeal been set:

A. by scheduling order? ☐ Yes ☒ No

EMERGENCY MOTIONS, MOTIONS FOR STAYS AND INJUNCTIONS PENDING APPEAL

Has request for relief been made below? ☒ Yes ☐ No

(See F.R.A.P. Rule 8.)

Any previous request for similar relief made to the 2nd Circuit? ☐ Yes ☒ No

Would expedited appeal eliminate need for this motion? ☐ Yes ☒ No

B. by firm date/argument notice? ☐ Yes ☒ No

C. If yes, enter date: _____

If no, explain why not: Order requires mandatory injunction to be complied with by May 24, 2002

Will the parties agree to maintain the stautus quo until the motion is heard? ☒ Yes ☐ No

Judge or agency whose order is being appealed: Jed S. Rakoff, U.S.D.J.

Brief statement of the relief requested: Defendants' seek a Stay pending appeal of the mandatory aspects of the District Court's Orders of May 9 and 21, 2002 granting Plaintiff's Motion for a Preliminary Injunction.

/s/ Robert F. Serio
by: *(Signature of Attorney)*
Signed name must be printed beneath
Robert F. Serio
Date: May 22, 2002

_____
Appearing for: *(Name of Party)*
Kemal Uzan, et al.

Appellant or Petitioner:
☐ Plaintiff ☒ Defendant

Appellee or Respondent:
☐ Plaintiff ☐ Defendant

ORDER

Before: Hon. Dennis Jacobs, *Circuit Judge*

IT IS HEREBY ORDERED that the motion for an emergency stay be and it hereby is DENIED without prejudice to renewal before the motions panel sitting June 4, 2002. Nokia's motion to file a 14-page brief in opposition is GRANTED.

FOR THE COURT:
ROSEANN B. MACKECHNIE, Clerk
By /s/ Arthur M. Heller
Arthur M. Heller
Motions Staff Attorney

Filed: May 24, 2002

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

[Filed May 22, 2002]

No. 02 CV 0666 (JSR)

MOTOROLA CREDIT CORPORATION and
NOKIA CORPORATION,

v.

KEMAL UZAN, *et al.*,

MOTION INFORMATION FORM

Motion for: EMERGENCY PARTIAL STAY OF PRELIMINARY INJUNCTION ORDER PENDING EXPEDITED APPEAL

MOTION BY: (*Name, address and sel mo. Of law form and of attorney in charge of case*)

OPPOSING COUNSEL: (*Name, address and sel. Mo. Of law firm and attorney in charge of case*)

SEE ATTACHED PAPER

Has counsel of opposing counsel:

A. been sought? ☒ Yes ☐ No
B. been obtained? ☐ Yes ☒ No

Has service beea affected? ☒ Yes ☐ No

Is oral argument desired? ☒ Yes ☐ No

Requested return date: May 23, 2002
(See Second Circuit Rule 27(b).)

Has argument date of appeal been set:

A. by scheduling order? ☐ Yes ☒ No

EMERGENCY MOTIONS, MOTIONS FOR STAYS AND INJUNCTIONS PENDING APPEAL

Has request for relief been made below? ☒ Yes ☐ No
(See F.R.A.P. Rule 8.)

Any previous request for similar relief made to the 2nd Circuit? ☐ Yes ☒ No

Would expedited appeal eliminate need for this motion? ☐ Yes ☒ No

B. by firm date/argument notice? ☐ Yes ☒ No

C. If yes, enter date: _____

If no, explain why not: Order requires mandatory injunction to be complied with by May 24, 2002

Will the parties agree to maintain the stautus quo until the motion is heard? ☒ Yes ☐ No

Judge or agency whose order is being appealed: Jed S. Rakoff, U.S.D.J.

Brief statement of the relief requested: Defendants' seek a Stay pending appeal of the mandatory aspects of the District Court's Orders of May 9 and 21, 2002 granting Plaintiff's Motion for a Preliminary Injunction.

/s/ Robert F. Serio
by: *(Signature of Attorney)*
Signed name must be printed beneath
Robert F. Serio
Date: May 22, 2002

_____
Appearing for: *(Name of Party)*
Kemal Uzan, et al.

Appellant or Petitioner:
☐ Plaintiff ☒ Defendant

Appellee or Respondent:
☐ Plaintiff ☐ Defendant

ORDER

Before: Hon. Amalya L. Kearse, Hon. Joseph M. McLaughlin, *Circuit Judges*, Hon. George B. Daniels*, *District Judge*.

IT IS HEREBY ORDERED that the motion for a stay pending appeal be and it hereby is DENIED.

FOR THE COURT:
ROSEANN B. MACKECHNIE, Clerk
By /s/ Arthur M. Heller
Arthur M. Heller
Motions Staff Attorney

Filed: June 5, 2002

APPENDIX D

UNITED STATES DISTRICT COURT
S. D. NEW YORK

[Filed Aug. 22, 2002]

No. 02 CIV. 666(JSR)

MOTOROLA CREDIT CORPORATION and
NOKIA CORPORATION,

Plaintiffs,

v.

KEMAL UZAN, *et al.*,

Defendants.

OPINION AND ORDER

RAKOFF, D.J.

Plaintiffs Motorola Credit Corporation ("Motorola") and Nokia Corporation ("Nokia") seek a finding of civil contempt against the nine defendants here, namely, five members of the Uzan family (Kemal Uzan, Cem Cengiz Uzan, Murat Hakan Uzan, Melahat Uzan, and Aysegul Akay), their associate Antonio Luna Betancourt, and three Uzan-controlled companies, namely, Unikom Iletism Hizmetleri Pazarlama A.S. ("Unikom"), Standart Pazarlama A.S. ("Standart"), and Standart Telekomunikasyon Bilgisayar Hizmetleri A.S. ("Standart Telekom"). Full familiarity with all prior proceedings in this case is here presumed.

The facts here pertinent are as follows. After a lengthy evidentiary hearing, the Court, by Order dated May 9, 2002 (the "May 9 Order"), granted plaintiffs certain preliminary

injunctive relief designed *inter alia* to prevent further dilution and diversion of certain stock held by defendant Standart Telekom in Telsim Mobil Telekomunikayson Hizmetleri A.S. ("Telsim"), another Uzan-owned and Uzan-controlled company.[1] This stock (hereinafter referred to as "the collateral"), consisting of 73.5% of Telsim's total stock, effectively represented plaintiffs' primary security for repayment of $2.7 billion in loans extended by plaintiffs to Telsim and thereafter seemingly diverted, in substantial part, to other Uzan-controlled entities. *See* May 21 Opinion at 12.

Among other things, the May 9 Order prohibited the defendants and their agents from taking any step, directly or indirectly, to "certificate, transfer, encumber, or affect in any way whatever" the collateral itself or its "value, status, and/or availability to this Court." Such a provision was necessary, among other reasons, because on January 4, 2002, certain of the defendants had caused Telsim to enact certain resolutions (the "January 4 Resolutions") that, if effective, would, by creating a new class of Uzan-controlled shares with authority to nominate four of Telsim's five directors and all three of Telsim's statutory auditors (as well as permitting Telsim to establish foundations or become a member in foundations), effectively strip the collateral of its voting, auditing, and management control rights. *See* May 21 Opinion at 16.

When, shortly after the January 4 Resolutions were promulgated, plaintiffs filed the instant lawsuit, defendant Murat Hakan Uzan, the chief executive of Telsim, sought to stave off injunctive relief by declaring that, since the January 4 Resolutions had never been registered or certified with the relevant Turkish authorities, they were "not now and never [have] been in effect." Declaration of Murat Hakan Uzan,

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[1] *See also* Order dated May 10, 2002 ("May 10 Order") continuing attachment of defendants' New York assets and Opinion dated May 21, 2002 ("May 21 Opinion") detailing findings supporting the May 9 and May 10 orders.

sworn to March 14, 2002, at ¶ 153. Mr. Hakan Uzan further declared, under penalty of perjury, that "[s]ince it appears to be an issue to which plaintiffs object . . . we will hold the resolution[s] in suspense." *Id.* Thus, when the Court issued its May 9 order prohibiting the defendants from, *inter alia*, affecting in any way whatever the status of the collateral, one would have thought that, if nothing else, no step would be taken by defendants to give effect to the January 4 Resolutions. *See* May 21 Opinion at 16, n. 4.

Yet, the very next day, May 10, 2002, Mr. Hakan Uzan, in defiance of the May 9 Order and in contravention of his own prior promise to the Court, caused Telsim to apply to the Turkish authorities for registration/certification of the January 4 Resolutions, while failing to disclose this step to this Court. The registration was ultimately accomplished on July 19, 2002. *See* Declaration of Jason Brown, sworn to July 30, 2002, Exhibit A (copy of the Turkish Commercial Gazette dated July 24, 2002 showing registration of Telsim's January 4 Resolutions by the Turkish Commercial Registry on July 19, 2002).

Nor is this all. The May 9 Order also required the defendants to deposit the collateral with the registry of this Court by no later than May 24, 2002. This relief, sought by plaintiffs from the outset of this case in order to safeguard the collateral from further tampering and thereby preserve the status quo, was a primary subject of a six-day evidentiary hearing held by this Court between April 9 and April 18, 2002 at which time the Court indicated its decision would be forthcoming shortly. But as soon as the hearing was over, three Telsim distributors, in seeming collusion with defendants (*see infra*), obtained in the Turkish courts emergency orders enjoining defendants from effecting any transfer of the collateral to this Court. Moreover, Mr. Hakan Uzan, though promptly informed of these orders, expressly directed his United States counsel not to disclose the existence of these

orders to the U.S. Courts. Further still, after this Court issued its May 9 Order directing transfer of the collateral to the registry of this Court, defendants not only made no meaningful effort to oppose the injunctions obtained by the Telsim distributors but also acquiesced in the issuance of still a fourth such injunction.

Against this background, plaintiffs ask the Court to hold the defendants in civil contempt for (i) seeking registration/certification of the January 4 Resolutions, and (ii) failing to transfer the collateral to the Court's registry. On June 21-24, 2002 the Court held an evidentiary hearing on the contempt motion, at which Mr. Hakan Uzan, having been guaranteed temporary "safe passage" by the Court for this purpose, testified.[2] Upon consideration of the evidence there adduced,

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[2] Much of Mr. Hakan Uzan's testimony—such as his assertion that he somehow "forgot" his prior promise to this Court not to seek registration/certification of the January 4 Resolutions, *see* transcript of evidentiary hearing ("tr.") at 17-18—is incredible on its face, and the Court so finds. The portion of his testimony that, in terms of his demeanor, appeared most sincere was his assertion that the two female defendants, his mother Melahat Uzan and his sister Aysegul Akay, were, despite their ownership interests in various Uzan-controlled business enterprises, effectively uninvolved in business decisions and, instead, simply followed the orders given by him, his brother Cem Cengiz Uzan, and their father Kemal Uzan. *See, e.g.*, tr. at 8-13; but other facts, discussed *infra*, cast doubt even on these assertions, especially as regards Ms. Akay. Even assuming Mr. Hakan Uzan's testimony is true in these respects, however, the agency role in which Melahat Uzan and Aysegul Akay have thereby placed themselves may still subject them to liability for civil contempt. *See infra*. As for Mr. Hakan Uzan's assertion that Uzan-related business decisions are not made at weekly family dinners, as prior witnesses had reported (*see* May 21 Opinion at 9), but are more diffuse, with Kemal, Cem, and Hakan taking individual responsibility for various Uzan-owned entities, *see, e.g.*, tr. at 301-03, this testimony even if credited, is largely irrelevant to the instant mater, or indeed, to any issue in this case since such division of responsibility does not absolve any of the individual Uzan defendants of joint and several liability for the actions of particular entities within the joint enterprise of Uzan entities that they own and control.

and taking account as well of the various other submissions of the parties, the Court reaches the following conclusions:

Unlike criminal contempt, civil contempt does not require showing of a willfully contemptuous purpose (although, as indicated below, the Court finds such purpose here). Rather, a movant seeking to hold a respondent in civil contempt must show, by clear and convincing evidence, that, in fact, the respondent has failed to comply with a clear and unambiguous order of the Court and that this failure is, at a minimum, the result of the respondent's failure to exercise due diligence to comply with the order. *See Drywall Tapers & Pointers of Greater N.Y. v. Local 530, Operative Plasterers & Cement Masons Int'l Ass'n*, 889 F.2d 389, 394 (2d Cir.1989); *Int'l Controls & Measurement Corp. v. Watsco, Inc.*, 853 F.Supp. 585, 587 (N.D.N.Y.1994).

As to the first specification of contempt, regarding the registration/certification of the January 4 Resolutions, it is beyond reasonable dispute that Mr. Hakan Uzan's decision on May 10, 2002 to ask the Turkish authorities for the registration/certification (subsequently granted) that, by his own admission, was necessary to give the Resolutions legal effect was a clear violation of the provision of the May 9 Order prohibiting him and his co-defendants from taking "any other step" that could, directly or indirectly, "affect in any way whatever" the status of the collateral. As previously noted, the Court does not credit Mr. Hakan Uzan's testimony that he somehow "forgot" his prior sworn promise to this Court not to seek to certify the January 4 Resolutions, tr. at 15-16; but even if this were true, it would still evidence a lack of reasonable diligence on his part. As for his claim that the registration/certification was necessary to meet certain upcoming deadlines under Turkish law, *see* tr. at 15, 146, both the imminence of the alleged deadlines and the necessity of meeting them is directly refuted by the only testimony of a Turkish legal expert directly on point, *see* Declaration of

Dr. Fadlullah Cerrahoglu, sworn to June 6, 2002 (Exhibit 6 to the Declaration of John O'Connor, sworn to June 5, 2002) at ¶ 27. Moreover, even if there were applicable deadlines, a defendant exercising reasonable diligence would have brought them to this Court's attention and sought modification of the May 9 Order, rather than, as happened here, surreptitiously flouting the order the day after it was issued. In short, the proof of Mr. Hakan Uzan's contempt with respect to the first specification is overwhelming.

As for the other defendants, all the Uzans were material beneficiaries of the January 4 Resolutions, several were members of the board that approved the Resolutions, and all but Melahat Uzan, the Court finds, were in a position to prevent registration/certification of the Resolutions if they had exercised reasonable diligence. While Hakan Uzan may claim that his sister, Aysegul Akay, despite her liberal education, blindly followed his orders on matters of business, *see supra*, the fact remains that she not only served on various boards of Uzan-controlled entities, including Telsim, *see* tr. at 304, but also owned no less than 20% of Standart Telekom, which, as the holder of legal title to the collateral, was in a position to veto the proposed diminishment in the power of its shares. *See* Plaintiffs' Contempt Hearing Exs. C-144, C-145; *see also* tr. at 148-149.

As for Melahat Uzan, assuming *arguendo* the accuracy of Mr. Hakan Uzan's testimony that, so far as business is concerned, she is entirely the pawn of male members of the family, the fact remains that she permits these members to put relevant stock ownership in her name, thus enabling them to carry out their various business plans more effectively. It follows that she is liable for contempt, in her agency capacity, when, as here, those business plans entail contempt of this Court's orders.

Finally, as to the three corporate defendants, while their roles in helping control the collateral and its disposition have

already been described by the Court in its May 21 Opinion, their relationship to the specific conduct of attempting to register/certify the January 4 Resolutions is more problematic and has not been proven to a standard of clear and convincing evidence. Consequently they will not be held in contempt as to this specification.

As to the second specification of contempt, regarding the failure to deposit the collateral in the registry of this Court, there is no dispute that the order was clear and the non-compliance plain. *See* tr. at 28-29. Nor can it be seriously maintained that the defendants have been reasonably diligent in complying with the Court's order. Standart Telecom, which holds legal title to the shares, has done nothing to effectuate the transfer, nor have the Uzans, who control all the relevant entities (Telsim, Standart, Standart Telehom, Unikom, Rumeli Telefon Sistemleri A.S., etc). Indeed, Mr. Hakan Uzan repeatedly testified at the contempt hearing that he has not yet decided whether or not to comply with the order to transfer the collateral to the registry of this Court *even if* the Turkish injunctions prohibiting such transfer are lifted. Tr. at 48-49, 256-57.

To be sure, since the Turkish injunctions remain in effect at present, the defendants contend that, regardless of their intent, their non-compliance with the provision of the May 9 Order requiring transfer of collateral to this Court's registry is excused because, even before the Order took effect, three distributors of goods and services to Telsim obtained preliminary injunctive orders from three Turkish courts barring transfer of any Telsim shares outside of Turkey. *See* Declaration of Murat Hakan Uzan, sworn to June 3, 2002, Exs. A, B, C (Turkish orders). (As noted above, defendants have also notified the Court that a fourth injunction has now issued, although its details are rather sketchy. *See* Defendants' letter to the Court dated July 10, 2002.)

The merits or demerits of these Turkish orders are no business of this Court. They provide, however, no justification for the defendants' noncompliance with the May 9 Order because, on inspection, it is apparent that they are in substantial measure the product of collusion between the plaintiff-distributors and the defendants here and that, in any case, the defendants, if they wished, could readily resolve any dispute with their distributors that might conceivably justify such relief.

To begin with, one must ask why any Telsim distributor would have such a strong interest in preventing the transfer of Telsim's stock to a U.S. Court's registry as to seek an *ex parte* injunction to prevent it. Indeed, it is hard to see that the distributors have any interest aside from being paid for the services and goods they provide.

Moreover, the timing of the suits, two of which were filed immediately following the conclusion of this Court's preliminary injunction hearing but before the Court had given its ruling, is highly suspicious. Although filed by separate counsel, the suits closely copy one another, with large portions of the wording of the respective complaints being nearly identical in all three complaints and all three seeking the identical, and unusual, relief. It further turns out that one of the complaints was brought by a company controlled by a Uzan family cousin, tr. at 34, and all three complainants do business virtually exclusively with Telsim. Tr. at 58.

Even more telling has been the defendants' response to the lawsuits. Although Mr. Hakan Uzan testified before this Court that he had no role in bringing these suits and that, once informed of them, he directed his attorneys to do all in their power to get the Turkish courts to lift these injunctions, tr. at 39, 208, 216-17, this testimony is belied by the record. Telsim's opposition papers to the injunctions (Plaintiffs' Contempt Hearing Exs. C-13, C-14, C-15) are worse than tepid: they virtually concede, and in some respects effectively

support, the arguments of the three plaintiffs. Thus, in alleged "opposition" to the injunctions, each of the (virtually identical) papers submitted by Telsim to the Turkish courts states:

> "[w]hile it is true that the plaintiff's relationship with Telsim constitutes its whole business, its damages would be very minor compared to the damages to be incurred by Telsim, its shareholders and other distributors and dealers if, as a result of the delivery of Telsim shares to abroad [sic], the license agreement, providing concessions, by and between the Ministry of Transportation and Telsim is cancelled."

See id. at ¶ 2. Collusion quite aside, no one can seriously contend that such "opposition" fulfills the obligation of the Uzan defendants who control Telsim to exercise reasonable diligence to comply with this Court's May 9 Order.

Nor is there any meaningful evidence that defendants' more recent "attempts" to lift the injunctions, *see* Defendants' letter to the Court dated July 10, 2002, have been anything other than tepid window-dressing. Whether or not the lawsuits are collusive, the defendants could readily arrange for their dismissal by coming to terms with their suppliers as to any claims the suppliers might have—a matter of simple economics that would in no way involve the Turkish courts. Defendants' failure to do so is further evidence of their failure to exercise reasonable diligence to comply with this Court's orders.

Most telling of all, perhaps, is the fact that the defendants, though fully aware of the Turkish injunctions well before the Court issued its May 9 Order, purposely kept them secret from the Court—going so far as to instruct their U.S. counsel not to reveal them to this Court or to the Court of Appeals judge who heard defendants' initial request for a stay of the

May 9 Order.[3] Whatever lame excuses defendants may now offer for this materially misleading conduct, the real reason, the Court finds, was to conceal as long as possible their involvement in these collusive suits and their intent to use them, if all else failed, to subvert the orders of this Court and of the Court of Appeals.

While most of the defendants did not play the obstructionist and deceptive role essayed by Mr. Hakan Uzan, all were in a position, to a greater or lesser extent, to assist in the steps necessary or helpful to transfer the collateral to this Court's registry, and none did. Accordingly, all will be found in civil contempt with respect to this specification.

In short, all the defendants are held in civil contempt for failing to deposit the collateral with the Court, and all but the corporate defendants are separately held in contempt in connection with the registration/certification of the January 4 Resolutions. This being civil contempt, the defendants can purge their respective contempts by causing the January 4 Resolutions to be decertified or rescinded and by causing the collateral to be transferred to the registry of this Court. However, given the Court's prior findings of the interdependent relationships among the defendants, *see* May 21 Opinion at 9-10, no single defendant can purge that defendant's contempt unless all of the defendants purge theirs, except that, since the corporate defendants are not implicated in the first specification, delivery of the collateral to the Court's registry will itself purge the corporate defendants' contempt.

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[3] Closing arguments at the preliminary injunction hearing were completed on April 18, 2002. The first Turkish injunction was entered on April 19, and U.S. counsel learned of them in late April or early May. *See, e.g.*, tr. at 30-32, 248. Nonetheless, the earliest that anyone brought these injunctions to the attention of any U.S. court was in a May 28, 2002 telephonic conference, well after the issuance of the May 9 Order and after the Court of Appeals had denied a stay of that Order.

Since the size of the penalty necessary to compel such compliance is uncertain, it is necessary to start small but impose a sliding scale. Specifically, until their contempts are purged, the defendants will be liable for a monthly fine, payable to the Clerk of the Court on the last day of each month, beginning at $1,000 for the month of June, 2002 (the first full month of contempt) and doubling each month thereafter (*i.e.*, $2,000 for July, $4,000 for August, etc) until either the contempts are purged, or the total amount owed (which is presently $3,000, *i.e.*, $1,000 for June and $2,000 for July) exceeds the estimated value of the collateral prior to passage of the January 4 Resolutions (approximately $1.5 billion), at which point (if not sooner) additional coercive measures may need to be considered. In addition, defendants are hereby held liable, jointly and severally, for plaintiffs' costs and reasonable attorneys fees in prosecuting this contempt motion. Plaintiffs should submit an accounting thereof within 10 business days hereof, after which defendants will have 10 business days to file any objections.

Plaintiffs claim that defendants are hell-bent on never transferring the collateral to this Court, not to mention never rescinding the January 4 Resolutions. Defendants, by contrast, claim that they are law abiding business persons, stymied in fulfilling their obligations only by legal and economic developments beyond their control. If the latter is true, they will not hesitate to purge their contempts promptly, at little cost to themselves. But even if the former is true, the Court is hopeful that the price of noncompliance will eventually bring them to their senses.

APPENDIX E

UNITED STATES DISTRICT COURT
S.D. NEW YORK

[Filed Jan. 7, 2003]

No. 02 Civ. 666(JSR)

MOTOROLA CREDIT CORPORATION and NOKIA CORPORATION,
Plaintiffs,

v.

KEMAL UZAN, *et al.*,
Defendants.

MEMORANDUM ORDER

RAKOFF, J.

Pursuant to Rule 65, Fed.R.Civ.P., and also to the All Writs Act, plaintiffs Motorola Credit Corporation and Nokia Corporation move to enjoin the defendants and those acting in concert with them from proceeding with a newly-filed Turkish injunction action and a previously-filed Turkish attachment action. Full familiarity with all prior proceedings in this case is here presumed.

The facts pertinent to the instant motion are as follows. Following the initiation of this suit in New York, Telsim Telekominkasyon Hizmetleri Anonim Sirketi ("Telsim") and Rumeli Telefon Sistemleri A.S. ("Rumeli Telefon"), which are non-parties to the lawsuit but controlled by the defendants here, filed (between them) demands for three arbitrations in Switzerland and one in France that with the exception of the latter threatened to interfere with this litigation. In connection

with one of the Swiss demands, Telsim obtained an order from the Turkish Civil Court of First Instance for the District of Kucukcekmece attaching the property of Motorola Komunikasyon Ticaret ve Servis Ltd. Sti. ("Motorola Turkey") and Motorola Ltd., both of which are affiliates of plaintiff Motorola Credit Corporation. *See* Declaration of Allison G. Kort, dated December 10, 2002, Exhibit 1, at 6.

Thereafter, following considerable delay, defendants in this action belatedly moved in this Court to compel arbitration, and plaintiffs cross-moved to enjoin defendants and those acting in concert with them (such as Telsim and Rumeli Telfon) from pursuing the arbitrations. The Court, by Orders dated September 30, 2002 and October 15, 2002, denied defendants' motion and granted plaintiffs' motion (except as to the French arbitration), finding, *inter alia*, that the Swiss arbitrations had been "commenced in an effort to undercut the prior orders of, and proceedings before, this Court." Memorandum Order, dated October 15, 2002, at 7.

At no time prior to the issuance of these orders did the defendants seek to stay this lawsuit, or any ancillary proceedings, pending issuance of the Court's decision on the arbitration issue and any appeal therefrom. Nevertheless, on October 21, 2002, over nine months after the initiation of the suit, defendants filed a motion to stay the entire lawsuit pending their appeal of the Court's September 30 and October 15 Orders. While recognizing that defendants may well have waived any right to the relief they so belatedly sought, the Court, by Order dated October 28, 2002, denied defendants' stay motion on the merits, concluding that "a stay would only serve to advance the very machinations for which defendants [had] previously been found in contempt of court." Memorandum Order, dated October 28, 2002, at 2.

Unable to secure their desired relief in this Court, the defendants and their proxies returned to the court in Kucukcekmece. On November 27, 2002, in plain contravention of

this Court's September 30 and October 15 Orders, the individual Uzan defendants (Kemal Uzan, Cem Cengiz Uzan, Murat Hakan Uzan, Melahat Uzan, Aysegul Akay, and Antonio Luna Betancourt) and the defendant-controlled company Telsim, filed an *ex parte* petition in the Turkish Civil Court of Kucukcekmece against plaintiffs and Motorola, Inc. seeking to stay the instant action, and to vacate the injunction and attachment decisions issued in connection thereto, as well as to stay the ancillary proceedings in England, Germany, France, Bermuda, and Channel Island Guernsey. *See* Affidavit of Samir Varma, dated December 20, 2002, Exhibit A (Civil Court of Kucukcekmece, Turkey, preliminary injunction Order, dated November 27, 2002). In response, the Turkish Court, that very day, issued an order granting the relief requested.[1]

Plaintiffs now seek an order from this Court enjoining defendants from further pursuing this Turkish action and, instead, requiring them to terminate the action and dissolve the earlier-issued attachment. While "it is well-settled that a federal court has the power to enjoin a party before it from pursuing litigation before a foreign tribunal," *U.S. v. Davis*, 767 F.2d 1025, 1038 (2d Cir.1985), considerations of comity counsel that such injunctions be "used sparingly." *Id.* As a preliminary matter, two threshold requirements for issuance of such an anti-foreign suit injunction must be met, to wit (1) the parties must be the same in both matters, and (2) resolution of the case before the enjoining court must be dispositive of the action to be enjoined. *See China Trade &*

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[1] The order issued by the Turkish Court purports on its face to enjoin, not the plaintiffs, but this Court itself (as well as various foreign courts), a power no foreign court possesses. This Court can only assume that something has been lost in translation and that the Turkish Court in fact meant to enjoin the plaintiffs from prosecuting these actions, as whatever the jurisdiction of the Turkish court over Motorola Credit Corporation, Motorola, Inc, and Nokia Corporation, the Turkish court has no jurisdiction over the courts of foreign sovereigns.

Dev. Corp. v. M.V. Choong Yong, 837 F.2d 33, 35 (2d Cir.1987).

Here, both these threshold requirements are satisfied. With regard to the Turkish injunction action filed on November 27, 2002, although Telsim and Motorola, Inc. are parties to the Turkish, but not to the U.S. action, and although Unikom Iletism Hizmetleri Pazarlama A.S. ("Unikom"), Standart Pazarlama A.S. ("Standart P."), and Standart Telekomunkikasyon Bilgisayar Hizmetleri A.S. ("Standart T.") are parties to the U.S., but not to the Turkish, action, the real parties in interest are the same in both matters. Indeed, the Court has previously found that Telsim is owned and controlled by, and is in the respects here relevant a mere proxy for, defendants. *See also Nagoya Venture Ltd. v. Souza*, 1998 U.S. Dist. Lexis 8580, at *19 (S.D.N.Y. June 11, 1998). As to Motorola, Inc., Unikom, Standart P. and Standart T., these entities were not necessary to the Turkish action, since the purpose of the action was to stay suits brought by Motorola Credit Corporation and Nokia Corporation (not Motorola, Inc.), and the individual Uzan defendants and Telsim obtained this relief despite the non-joinder of the other corporate entities. *See MasterCard Int'l, Inc. v. Argencard Sociedad Anonima*, 2002 U.S. Dist. Lexis 4625, at *30-31 (S.D.N.Y. March 20, 2002) (holding that the identity of party requirement was satisfied despite the intervention of an additional party in the foreign proceeding since this party was not a necessary party to the action). In addition, the only issue to be decided by the Turkish court is whether this and other actions should be dismissed in favor of arbitration, a question that this Court has already resolved in plaintiffs' favor. *See China Trade*, 837 F.2d at 35.

With regard to the Turkish attachment action filed on June 19, 2002, the relevant parties are Telsim, a proxy for defendants in all respects here relevant, as well as Motorola Turkey and Motorola, Ltd., affiliates of plaintiff Motorola

Credit Corporation. Again, the sole question before the Turkish court in the attachment action concerns the propriety of the Swiss arbitration, a matter that this Court has now resolved.

Once the threshold requirements are met, the issue becomes one of informed discretion. Here, the Court finds that with regard to both Turkish suits numerous supplemental factors support the issuance of an anti-foreign suit injunction against the defendants: (1) the Turkish actions threaten this Court's jurisdiction (indeed, the Turkish injunction suit has purported to stay proceedings in, and to nullify preliminary orders issued by, this Court); (2) the Turkish actions frustrate the United States' stated interest in prosecution of civil RICO claims; and (3) the Turkish actions were initiated by defendants in contravention of and in a tactical effort to evade the prior orders of this Court. *See id.* at 36-37; *Mastercard Int'l*, 2002 U.S. Dist Lexis 4625, at * 31-32. These factors more than overbalance any countervailing considerations of comity or otherwise.

Accordingly, the Court pursuant to Rule 65, Fed.R.Civ.P.,[2] hereby directs defendants, their proxies, and all others in concert with them, to take all steps necessary to withdraw and cause to be dissolved the Turkish injunction granted on November 27, 2002 and the action on which it is premised, and enjoins defendants from initiating any similar proceeding; and further, bars them from effectuating the attachment entered on June 19, 2002 against Motorola Turkey and Motorola Ltd. in connection with the Swiss arbitration and, instead, requires them to seek its immediate dissolution.

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[2] Finding that the Court's power pursuant to Rule 65 is sufficient to grant the requested relief, the Court need not reach the question of whether the remedy could also issue under the All Writs Act, 28 U.S.C. § 1651.

APPENDIX F

UNITED STATES DISTRICT COURT
S.D. NEW YORK

[Filed Aug. 8, 2003]

No. 02 CIV. 666(JSR)

MOTOROLA CREDIT CORPORATION and NOKIA CORPORATION,
Plaintiffs,

v.

KEMAL UZAN, *et al.*,
Defendants.

MEMORANDUM ORDER

RAKOFF, District Judge.

Defendants move under Rules 62(c) and 62(d), Fed. R.Civ.P., *either* for a stay pending appeal of execution of the judgment entered August 1, 2003 pursuant to the Order and Opinion dated July 31, 2003 (the "July 31 Order"), full familiarity with which is here presumed; *or*, failing that, for a temporary stay until the Court of Appeals "has had a fair opportunity" to consider a comparable motion under Rule 8, Fed. R.App. P. *See* Notice of Motion, dated August 5, 2003, at 1.

As defendants note, a court, in determining whether a stay pending appeal is appropriate, must first consider "whether the stay applicant has made a strong showing that he is likely to succeed on the merits . . . . " *Hilton v. Braunskill*, 481 U.S. 770, 770, 107 S.Ct. 2113, 95 L.Ed.2d 724 (1987). *See* Defendants' Memorandum of Law In Support Of Defendants' Motion For Stay ("Def.Mem.") at 2. Yet while recognizing this high standard, defendants, in their motion papers, do little

more than recite in conclusory fashion numerous points on which the Court has ruled against them, apparently in the belief that quantity can substitute for quality. Mere conclusions, however, whether applied to one issue or many, do not constitute any kind of showing, let alone the requisite "strong showing." Accordingly, defendants have not even met the first requirement of a stay pending appeal.

Nonetheless, in recognition of the substantial relief embodied in the Court's judgment, a few words may be said about each of the seven issues that defendants asserts were "errors affecting the final judgment . . . . " Def. Mem. at 3.

(1) "Denial of Arbitration Rights" (Def. Mem. at 3-4). Defendants allege that the Court erred in denying defendants' motion to compel arbitration because the Court "mistakenly distinguished" relevant Second Circuit precedent, Def. Mem. at 4; but they fail to specify in what respects the distinctions were mistaken. There is no doubt that the arbitration issue was one of the more difficult issues confronting the Court, but the Court's analysis of that issue was fundamentally premised on the bedrock principle, repeatedly endorsed not only by the Second Circuit but also by the Supreme Court, that arbitrability is ultimately a matter of contract, that is, of who agreed to what. As explained in the July 31 Order at 28-35, the parties here never agreed to anything; the defendants here have no equitable standing to try to take advantage of what the plaintiffs agreed to with non-party Telsim; and, in any event, what the plaintiffs agreed to with Telsim does not extend to the instant dispute, especially in the case of plaintiff Motorola Credit Corporation ("MCC"). Defendants' instant papers address none of this.

It remains only to add that even if one were to assume for the sake of argument that the case should have been referred to arbitration, this would not warrant a stay of the injunctive relief embodied in the judgment, since such relief would still be authorized "in aid of arbitration." *See* July 31 Order at 36.

(2) "Inappropriate Exercise Of Supplemental Jurisdiction" (Def. Mem. at 4-5). While the defendants assert that "this Court never had original jurisdiction over Plaintiffs' RICO claims" (Def. Mem. at 4), they give no ground whatever for their conclusory assertion (Def. Mem. at 4) that this is because the instant case is "[u]nlike the situation" in *Lerner v. Fleet Bank, N.A.*, 318 F.3d 113 (2d Cir.2003), on which the Court relied. *See* July 31 Order at 15. In the Court's view, *Lerner* is not only directly apposite but also reflects underlying Supreme Court precedent. Moreover, implicit in the Court of Appeals' earlier decision in the present case is a recognition that the District Court had original jurisdiction over the RICO claims, since the Court of Appeals, despite dismissing those claims, remanded to this Court with direction that it determine whether to exercise supplemental jurisdiction "pursuant to 28 U.S.C. § 1367(c)," *Motorola Credit Corporation v. Uzan*, 322 F.3d 130, 137 (2d Cir.2003), a section that would not be applicable if there had not been original jurisdiction. In short, on this issue defendants' position appears to this Court to be wholly without merit.

(3) "Conduct of Improper 'Trial' "(Def. Mem. at 5). Defendants claim that the trial of this case occurred after the Court "was divested by the Federal Arbitration Act of jurisdiction to proceed"; that, in any event, the trial focused on the RICO claims that were later held to be unripe; and, finally, that the defendants were barred from participating by one or more Turkish injunctions. Def. Mem. at 5.

The first argument is simply a reiteration of defendants' point (1), *supra*, that the case should have been referred to arbitration. Listing it here as a separate point gives it no greater or lesser weight.

The second argument (that the trial focused on the RICO claims) has no validity whatever, since at all times the trial was a trial of all claims, each of which had to be analyzed separately. Moreover, virtually all the proof relevant to the

RICO claims was also relevant to the claims of fraud and civil conspiracy.

Finally, the third argument (that the defendants were barred from participating in the trial by Turkish injunctions)—besides being largely a rehash of the separate argument defendants make in their point (4), *infra*, that the Court failed to respect foreign law—is here a complete irrelevancy, because (a) the defendants never moved to suspend the trial on this basis; (b) the injunctions here referred to were procured by the defendants themselves in violation of this Court's prior orders, *see* July 31 Order at 27; Memorandum Order, dated January 6, 2003, at 3; (c) the injunctions in question actually purported to enjoin this Court itself from proceeding with this case and thus were void on their face; and (d) the injunctions in question were overturned by the Turkish Supreme Court of Appeals on February 25, 2003, with that court noting that the issuing court's actions were "totally lack[ing in] authority," "illegal," "impossible and inappropriate," and "creat[ed] doubt about the trustworthiness of the [issuing] judge." *See* translation of the decision, Exhibit 2 to Declaration of Gordon M. Clay, annexed to Plaintiffs' Memorandum Of Law In Opposition To Defendants' Motion For Stay Without Bond ("Pl.Mem."). Additionally, it should be noted that, in fashioning a trial in these circumstances, the Court, *sua sponte*, afforded the absentee defendants further protection by relying heavily on the evidence adduced at the earlier six-day preliminary injunction hearing and two-day contempt hearing, at both of which defendants appeared and fully contested what, from a factual standpoint, were the same issues raised at trial.

(4) "Failure to Respect Foreign Law" (Def. Mem. at 5-6). Defendants' next assignment of error is the Court's alleged failure to defer to various other Turkish injunctions, especially the "multiple injunctions . . . issued by Turkish courts enjoining Defendants from transferring shares of Telsim stock." (Def. Mem. at 6). While the sordid history of the

defendants' collusive procurement of these injunctions has been largely described in prior rulings of this Court, it may be well to revisit a few of the low points.

After initially ordering defendants to transfer the Telsim collateral to the registry of this Court, the Court suspended that requirement pending a full evidentiary hearing on the requested preliminary injunction. *See* Memorandum Order, dated February 14, 2002. Following several days of testimony, with witnesses called by both sides, that hearing concluded on April 18, 2002, at which time the Court reserved decision. On or about the very next day, *see* July 31 Order at 47, a supplier of Telsim, nominally suing Telsim for relatively modest amounts, obtained an *ex parte*, uncontested injunction barring the transfer of Telsim stock to this Court. At least two other such injunctions were thereafter obtained by similar suppliers in other parts of Turkey. *See* Order, dated August 22 2002, at 9-10. Although fully aware of these injunctions, the defendants expressly ordered their United States counsel not to reveal them to this Court. *See* July 31 Order at 47. Only after this Court issued its order granting the preliminary injunction and ordering transfer of the shares did defendants reveal the Turkish injunctions, contending that they were now barred from transferring the shares. *Id.* at 47, 143.

Defendants nonetheless assured this Court that they would take meaningful steps to overturn or modify the Turkish injunctions (which, seemingly, had no supportable rationale, since the amounts allegedly owed the suppliers could easily be satisfied by ordinary bonds). *See* Order, dated August 22, 2002, at 11-12. Subsequent evidence, however, revealed that the defendants only made a patently sham attempt to do so, thus providing further evidence that, as this Court subsequently held, the injunctions were collusively procured. *Id.* [1]

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[1] More generally, the degree to which defendants have misled this Court is, frankly, unparalleled in this Court's experience. Nor is this con-

Moreover, any doubt about the defendants' hypocrisy and contumacious intent was laid to rest when the Court suggested that, in place of the transfer of Telsim stock, defendants simply post a bond in this Court. *See* Order, dated October 15 2002, at 2 n. 1. With virtually no explanation, defendants declined to post such a bond, in any amount, preferring to continue their contempt of court.

Now, in their most recent papers, defendants submit an affidavit of Turkish counsel averring that since the injunctions in question were not appealed, the injunctions have now become final, and that therefore this Court's latest order to defendants to take the necessary steps to undo the injunctions comes too late. But, of course, the failure of defendants to appeal the injunctions in question was not only itself a violation of earlier orders of this Court but, more importantly, is just one more proof of the collusive nature of the injunctions.

Without reiterating further the many other such examples described in the prior orders of this Court, the point is that the evidence is plain that the defendants undertook fraudulent and collusive actions in Turkey to procure sham injunctions whose sole purpose was to avoid compliance with this Court's orders and proceedings, and that accordingly the claim that this Court's disregard of defendants' machinations somehow constitutes error is without substance.

(5) "Entry of Judgment Against Non-Parties" (Def.Mem.6-7). The defendants next claim that the "[t]he Court has entered judgment for over $4 billion against 130 companies," Def. Mem. at 6, most of which were not parties to the case, and that it has done so without particularized evidence sufficient to pierce the corporate veil. *Id.* This is doubly erro-

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clusion limited to this Court. Magistrate Judge Maas, to whom much of the discovery in this case was referred, ultimately concluded that the defendants had been "lying to the Court since I got involved in this case." Transcript, Hearing of November 18, 2002, at 4. The English Court that imposed criminal contempt terms of imprisonment on two of the defendants reached similar conclusions. *See* July 31 Order at 151-53.

neous. First, the Court only entered judgment against the parties to this case. Second, the Court held that such judgment could be collected not only from the defendants' personal assets but also from assets of entities over which the defendants "exercise complete domination and control and through which domination defendants committed the foregoing frauds against plaintiffs," July 31 Order at 172, thus satisfying the two classic indicia of veil-piercing. *See, e.g., Matter of Morris v. N.Y. State Dept. of Taxation and Fin.*, 82 N.Y.2d 135, 603 N.Y.S.2d 807, 623 N.E.2d 1157, 1160-1161 (1993). The Court made detailed findings, moreover, that at least 130 of defendants' companies, listed by name, satisfied these criteria because the defendants operated their entire economic empire as a single enterprise, totally controlled by them, and used by them to disguise the transfer of monies and assets. *See* July 31 Order at 67-81. While, obviously, attachments and the like are not self-executing remedies, and thus (as has already occurred in this case) any entity whose assets are attached has ample opportunity to contest the attachment as to it, the strong evidence that the Uzan defendants make use of their tightly-controlled web of companies as a device to facilitate their frauds is more than sufficient to justify the aforementioned order.

(6) "Improper Equitable Judgment" (Def. Mem. at 6). Defendants next argue that if they fail to comply with the Court's direction that they promptly transfer Nokia's portion of Telsim stock (7.5%) to the registry of this Court, then, under the Court's order, they will suffer as a sanction a judgment of $1.7 billion, which is twice what Nokia is owed and "bears no relation to the harm Nokia would allegedly suffer should Defendants not transfer 7.5% of Telsim's shares to the registry of the Court." (Def. Mem. at 7).

To begin with, this point only becomes relevant if defendants once again act in contempt of the Court's orders to transfer Telsim stock, the only impediment to which is the collusively obtained injunctions that defendants could readily

satisfy by paying their suppliers. But as already indicated, defendants have repeatedly evidenced their contempt for the prior such orders of the Court, refusing even the alternative of posting a bond in lieu of transferring the shares.

Thus, to have any hope of compelling compliance, as well as of compensating Nokia for losses sustained, the Court must resort to more stringent measures. *See United States v. United Mine Workers of America*, 330 U.S. 258, 303-304, 67 S.Ct. 677, 91 L.Ed. 884 (1947). Since the Telsim stock was supposed to compensate Nokia for the net monies owed in event of default, and since defendants have refused to provide meaningful discovery as to the financial worth of Telsim (and therefore the value of its stock), a reasonable measure of the compensatory aspect of the sanction is the net monies owed plus interest, and a reasonable measure of the additional amount needed to coerce compliance is to double that amount, which, as set forth in the July 31 Order at 171, is how the $1.7 amount was arrived at. (By contrast, in *United Mine Workers*, the coercive portion of the sanction award was a full four times the compensatory portion. *Id.* at 305, 67 S.Ct. 677.) Accordingly, the $1.7 billion sanction is both well grounded and fully within accepted limits.

(7) "Substantial Remedial Defects" (Def. Mem. at 7-8). Finally, in the most conclusory of all their points, defendants claim that the injunctive relief granted to MCC "is an improper adjunct to the $4 billion in monetary damages" (Def. Mem. at 7) because a treatise on equitable remedies says that it is "not appropriate," *id.*, and that, furthermore, the punitive damages award somehow violates Illinois law and due process. This is absurd. The injunctive relief largely consists of the classic relief of making available to MCC for satisfaction of its monetary judgment the collateral in which it had an interest or, in light of defendants' conversion of the collateral, the converted equivalent thereof; and the punitive damages are a very modest multiple of the compensatory damages. *See* July 31 Order at 167-69.

In sum, defendants have not even satisfied the first requirement of a stay pending appeal, *i.e.*, a strong showing of success on the merits. In light of the history of this case, it is also clear that they likewise cannot satisfy at least two of the three additionally required elements, *i.e.*, avoiding substantial injury to the adversary parties and fulfilling the public interest. *See Hilton v. Braunskill*, 481 U.S. 770, 776-77, 107 S.Ct. 2113, 95 L.Ed.2d 724 (1987).[2] But the problem of injury to plaintiffs might be largely obviated, at least as to MCC, if defendants were willing to post a bond equal to the amount of the judgment, *i.e.* $4.2 billion. Pleading a kind of billionaires' poverty, defendants claim this is beyond their means—though their repeated failure to provide meaningful financial discovery makes this claim impossible to evaluate. Nonetheless, plaintiffs, in an effort to expedite matters, have agreed to accept a bond in the much-reduced sum of $1 billion. *See* Pl. Mem. at 20. Yet defendants, incredibly, maintain they should not have to post any bond at all.

Consequently, for all the foregoing reasons, the prong of the instant motion requesting a general stay pending appeal is hereby denied. With respect to the second prong requesting a short-term stay, however, the Court agrees to stay execution of judgment for an additional week, that is, until August 15, 2003. If, during the week, defendants post a supersedeas bond of $1 billion, then, on consent, the Court will stay execution of the judgment pending appeal. Alternatively, even if defendants do not post such a bond, the delay of one week will give them ample time to apply for a stay to the Court of Appeals.

SO ORDERED.

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[2] It is also doubtful to what extent defendants can satisfy the other element, *i.e.*, irreparable injury to the party seeking the stay, since defendants' prior conduct suggests that they do not intend to satisfy the judgment in any event.

APPENDIX G

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

[Filed January 24, 2003]

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02 Civ 0666 (JSR) (FM)

MOTOROLA CREDIT CORPORATION and NOKIA CORPORATION,
Plaintiffs,

v.

KEMAL UZAN, *et al.*,
Defendants.

DEFENDANTS' STATEMENT OF INTENTION REGARDING THE TRIAL SCHEDULED FOR FEBRUARY 10, 2003

Defendants hereby inform the Plaintiffs and the Court that they will not introduce any evidence or conduct any examinations or present any witnesses in connection with the trial scheduled to commence on February 10, 2003. Nor do Defendants intend to appear, in person or through counsel, at any time during the scheduled trial.

The injunctions issued by the Kucukcekmece (Attachment A, with official translation) and Hayraboglu (Attachment B, with official translation) courts in the Republic of Turkey preclude the Defendants from participating in any proceeding on the merits of this lawsuit, just as these injunctions forbid the Plaintiffs from prosecuting this and other actions around the world. Notwithstanding the prior rulings of this Court, the Defendants and Telsim, as citizens of the Republic of Turkey, profess their right under the Constitution and laws of Turkey

to seek the assistance of the Turkish Courts to effectuate their arbitration rights and to oppose the jurisdiction of the Courts of the United States over the subject matter of this case and over the person of the Defendants and Telsim. As citizens and domiciliaries of the Republic of Turkey, moreover, the Defendants and Telsim are bound to obey the lawful orders of the Turkish Courts that are directed toward them, and any failure to do so would subject the Defendants to criminal sanctions in Turkey.

In addition, the Defendants have asserted that the District Court is without jurisdiction while the appeal of this Court's denial of their motion to compel arbitration and grant of Plaintiffs' motion to enjoin arbitration is pending before the Second Circuit. More broadly, the Defendants further continue to contest the jurisdiction of this Court and will oppose all efforts to enforce any judgment abroad.

Respectfully submitted,

Dated: New York, New York
January 24, 2003

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Supreme Court, U.S.
FILED
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No. 04-1255

IN THE

Supreme Court of the United States

KEMAL UZAN, CEM CENGIZ UZAN, MURAT HAKAN UZAN, MELAHAT UZAN, AYSEGUL AKAY, *ET AL.*
Petitioners,

v.

MOTOROLA CREDIT CORP. AND NOKIA CORP.,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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STATUTES

9 U.S.C. § 16(a) ..... *passim*

REPLY BRIEF FOR PETITIONERS

Respondents do not dispute that the courts of appeals are split on whether a non-frivolous appeal pursuant to Section 16(a) of the FAA divests district courts of jurisdiction to conduct a trial. Nor do they contest the importance of this issue, or the state of confusion among the lower courts. Instead, respondents contend this ripe split is not implicated here because the district court initially—and improperly—characterized petitioners' Section 16(a) appeal as "frivolous." In fact, both the court of appeals and the district court itself have since acknowledged that the Section 16(a) appeal presented difficult, non-frivolous issues. For that reason, the court of appeals assigned no significance to the district court's improper designation of petitioners' appeal as frivolous. Rather, it concluded that the merits of a case are not "involved in" an arbitrability appeal under Section 16(a), and that district courts therefore are not divested of jurisdiction over the merits pending such appeals. That holding squarely conflicts with the decisions of other courts of appeals, as the court below expressly acknowledged. This case presents that conflict in the only circumstance that it could arise before this Court.

This international case also squarely presents whether the FAA or the law chosen by a general choice-of-law clause governs questions of arbitrability. Precisely because this is an international case, it offers an excellent vehicle for deciding that question.

I. This Case Offers An Ideal Vehicle For Resolving The Circuit Split Over The Jurisdiction of District Courts Pending Non-Frivolous Section 16(a) Appeals.

A. The court below expressly acknowledged that its holding in this case directly conflicts with the decisions of other circuits. In this case, the Second Circuit held that non-frivolous interlocutory appeals pursuant to Section 16(a) do not divest district courts of jurisdiction to proceed on the merits while the appeal is pending. Pet. App. 25a. Other courts of appeals, however, have reached the opposite

conclusion. These courts have held that further proceedings by the district court are "involved in" an appeal that presents the precise issue of whether, in view of an agreement to arbitrate, there should be any district court proceedings at all. Pet. 14-16. Respondents offer *no* defense of the holding of the court below (and the Ninth Circuit) that "further district court proceedings in a case are not 'involved in' the appeal of an order refusing arbitration . . . ." Pet. App. 25a. Instead, they contend that "there is no split among the circuits on the facts presented here, where the district court found the appeal frivolous and the court of appeals refused to issue a stay." Br. in Opp. 14. That contention is incorrect.

1. Although courts considering the jurisdictional impact of Section 16(a) appeals have recognized that a frivolous interlocutory appeal may not confer jurisdiction on a court of appeals, that is true only if the appeal is in fact frivolous. As Judge Easterbrook explained in *Bradford-Scott Data Corp.* v. *Physician Computer Network, Inc.*, 128 F.3d 504 (7th Cir. 1997), "the court of appeals or the district court may declare that the appeal is frivolous, *and if it is* the district court may carry on with the case." *Id.* at 506 (emphasis added); cf. *United States* v. *Brooks*, 145 F.3d 446, 456 n.6 (1st Cir. 1998) (explaining that a district court's finding of frivolousness in the context of an interlocutory appeal "would not be conclusive" as to the jurisdictional impact of the appeal because "frivolousness is a question of law and thus subject to de novo review").

In *Bombardier*, moreover, the D.C. Circuit recognized, in the course of deciding an unsuccessful Section 16(a) appeal, that a stay is "unnecessary, because [appellant's] appeal . . . was facially non-frivolous and thus the district court was divested of jurisdiction over the underlying action until we could determine the threshold issue of whether the dispute between the parties is arbitrable under the FAA." *Bombardier Corp.* v. *Nat'l Ry. Passenger Corp.*, 333 F. 3d 250, 252 (D.C. Cir. 2003) (citing *Bombardier Corp.* v. *Nat'l*

Ry. Passenger Corp., No. 02-7125, 2002 WL 31818924, at *1 (D.C. Cir. Dec. 12, 2002)). Similarly, in *Blinco* v. *Green Tree Servicing, L.L.C.*, 366 F.3d 1249 (11th Cir. 2004), the Eleventh Circuit recognized that, because the "'filing of a notice of appeal is an event of jurisdictional significance . . . [that] divests the district court of its control over those aspects of the case involved in the appeal,'" *id.* at 1251 (quoting *Griggs* v. *Provident Consumer Discount Co.*, 459 U.S. 56, 58 (1982)), a district court should not exercise control over a case "upon the filing of a non-frivolous appeal under [Section] 16(a)." *Id.*[1]

Consequently, an erroneous district court declaration of frivolousness is not controlling on appeal, and an appellate court's failure to issue a stay following that erroneous declaration does not vest the district court with jurisdiction that an appeal otherwise takes away. Under *Steel Co.* v. *Citizens for a Better Env't*, 523 U.S. 83 (1998), a non-frivolous filing is sufficient to grant a court jurisdiction. The filing of a non-frivolous appeal under Section 16(a) thus grants *the court of appeals* jurisdiction and *deprives* the district court of jurisdiction. See *Griggs*, 459 U.S. at 58. A district court's mistaken claim of frivolousness cannot give it jurisdiction it does not have. Consequently, nothing cited by respondents comes close to reconciling the decision below (and the Ninth Circuit's similar ruling) with the rule that governs in the Seventh, Eleventh and D.C. Circuits.

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[1] The Eleventh Circuit's statement that it should stay litigation unless finding that a Section 16(a) appeal is frivolous, *Blinco*, 366 F.3d at 1253, does not suggest that district courts retain jurisdiction whenever the court of appeals fails, for unexplained reasons, to issue a stay following a non-frivolous appeal. See Br. in Opp. at 20. The Eleventh Circuit undoubtedly did not contemplate the type of breakdown in the appellate process that occurred here. Moreover, its recognition that the filing of a non-frivolous appeal "is an event of jurisdictional significance," *id.* at 1251 (internal quotation marks and citation omitted), makes clear that it views traditional stay practice as an orderly way to proceed, not a jurisdiction-altering process.

2. Any "frivolous appeal" exception to the general rule of divestiture is not implicated in this case because *both* lower courts expressly acknowledged that petitioners' interlocutory appeal under Section 16(a) was *non-frivolous*. The panel assigned to petitioners' interlocutory appeal accepted jurisdiction over the appeal, consolidated it with petitioners' (ultimately successful) appeal from the grant of a preliminary injunction, and remanded the arbitration issues for reconsideration in light of the "changed landscape" of the case. Pet. App. 251a, 263a. The court of appeals in this appeal expressly confirmed that petitioners' prior interlocutory appeal "was not frivolous." Pet. App. 23a. Even the district court acknowledged that "the arbitration issue" presented by petitioners' Section 16(a) appeal "was one of the more difficult issues confronting the Court." Res. App. 24a.

Respondents' suggestion that the first panel decision embraced the district court's initial view that the Section 16(a) appeal was frivolous, and their corresponding effort to dismiss the later panel's *express* statement that the interlocutory appeal was not frivolous as irrelevant "hindsight," Br. in Opp. at 15 n.4, are wishful thinking. The initial panel's unexplained failure to issue a stay cannot be read as an endorsement of the district court's declaration of frivolousness; inaction is often just that—inaction. To the extent inaction is relevant, it demonstrates that the first panel thought the Section 16(a) appeal was *not* frivolous, since it refused respondents' motion to dismiss the appeal as frivolous. More fundamentally, the nature of petitioners' Section 16(a) appeal did not change over time. The recognition, by both the second panel and the district court itself, that the interlocutory appeal raised non-frivolous issues forecloses any claim that the initial appeal was frivolous.

B. Respondents raise a number of other claims in an effort to show that "this case would be a poor vehicle for review." Br. in Opp. 16. Those claims were properly rejected by the court below and pose no impediment to resolution of the conflict squarely presented by this case.

1. Contrary to respondents' contention (Br. in Opp. 17), it makes no difference that the district court entered its final judgment after the court of appeals had remanded the Section 16(a) appeal. The district court's final judgment was founded on a *trial*, on *orders* enjoining foreign arbitrations, on sanctions orders, and on a decision *deeming defendants to have waived their right to a jury trial*, all entered *after* the defendants' Section 16 appeal had divested the district court of jurisdiction. It is well established that, where a district court conducts critical proceedings (even portions of a trial) without jurisdiction during an interlocutory appeal, the resulting judgment is a nullity. See *United States* v. *Defries*, 129 F.3d 1293, 1302-1303 (D.C. Cir. 1997) (reversing convictions because trial began before court of appeals had issued mandate over interlocutory *Abney* appeal, even though mandate had been released at time judgment of conviction entered); cf. *Brooks*, 145 F.3d at 457 (holding that steps taken by district court to empanel and swear a jury and begin trial were "nullities" because court of appeals had jurisdiction over interlocutory appeal pursuant to 18 U.S.C. § 3731). The fact that the district court had recovered jurisdiction when it entered final judgment does not render valid the acts it took before recovering jurisdiction. Cf. *Grupo Dataflux* v. *Atlas Global Group L.P.*, 541 U.S. 567 (2004) (reversing judgment because district court lacked subject-matter jurisdiction at the time case commenced, although the jurisdictional defect had been cured by the time judgment was entered). In any event, the court below attached no significance to the date of the district court's final judgment, and there is thus no reason this Court should now. *Nat'l Collegiate Athletic Ass'n* v. *Smith*, 525 U.S. 459, 470 (1999) (Court ordinarily does "not decide * * * issues not decided below").[2]

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[2] The unique removal jurisprudence at issue in *Grubbs* v. *Gen. Elec. Credit Corp.*, 405 U.S. 699 (1972), has no bearing here. Moreover, no party raised a jurisdictional objection before trial or judgment in *Grubbs*. *Id.* at 701. In contrast, petitioners consistently objected from

2. Nor did petitioners waive the jurisdictional error at issue here. See Br. in Opp. 17-18. After the district court denied petitioners' motion to compel arbitration, petitioners immediately appealed, and then advised the district court that they would not participate further pending resolution of the appeal. C.A. App. 1729, 1733. Following remand of the Section 16(a) appeal, petitioners likewise argued that, because the district court had lacked jurisdiction to conduct trial and enter orders pending resolution of the interlocutory appeal, all such orders and proceedings were "nullities." C.A. App. 2223-2224. Neither the trial court nor the court of appeals rested their decision on waiver, and the argument is without merit.[3]

Respondents' waiver argument also departs from the fundamental precept that, if a district court erroneously asserts jurisdiction, that error can be corrected on appeal following final judgment. *Van Cauwenberghe* v. *Biard*, 486 U.S. 517, 527 (1988). The absence of any legal authority to support that departure confirms its lack of merit.

3. Finally, respondents erroneously claim that the first question is not presented at all because a Section 16(a) appeal by a litigant who is not a party to the arbitration agreement is necessarily frivolous. Br. in Opp. 18-20. But, as just noted, both the court of appeals and the district court acknowledged that petitioners' interlocutory appeal raised issues that were not only non-frivolous, but difficult. See p. 4, *supra*. Indeed, one of the cases respondents themselves cite expressly holds that parties who were not signatories to an arbitration agreement had "a right to

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their first appearance before the district court, and maintained that the district court was without jurisdiction to conduct a trial from the moment that they appealed its denial of their motion to compel arbitration and its injunction against pending Swiss arbitrations.

[3] Respondents speculate that "the Uzans would not have attended trial in any event." Br. in Opp. 17. But such speculation is irrelevant to whether the district court had jurisdiction during the Section 16(a) appeal.

appeal under section 16" after their motion for a stay pending arbitration had been denied. *IDS Life Ins. Co.* v. *SunAmerica, Inc.*, 103 F.3d 524, 527 (7th Cir. 1996).

Bombardier makes clear, moreover, that petitioners' ultimate lack of success on the merits of their interlocutory appeal is irrelevant to the jurisdictional impact of the appeal. In that case, the D.C. Circuit held that a non-frivolous Section 16(a) appeal, even if unsuccessful, divests the district court of jurisdiction *Bombardier*, 2002 WL 31818924, at *1. Besides, this first question could reach this Court only because petitioners ultimately were unsuccessful on the arbitrability question. See Pet. 18-19. It is precisely for that reason that this case provides the ideal vehicle for resolving the first question presented. As the petition shows—and respondents nowhere dispute—that question is important, recurring, and warrants this Court's review.

II. This Case Offers An Ideal Vehicle For Resolving The Role Of Choice-of-Law Clauses In Arbitrability Disputes.

Respondents do not contest that the courts of appeals are split over whether a general choice-of-law clause evidences parties' intent to have specific rules decide questions of arbitrability. Pet. 21-25. Nor do they contest that the inconsistent rulings on this issue generate great uncertainty. Instead, respondents argue that this important conflict is not implicated by this international case.[4]

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[4] It is ironic that respondents stress the international character of this commercial dispute. Indeed, *Scherk* v. *Alberto-Culver Co.*, 417 U.S. 506 (1974), on which respondents now rely, holds that a U.S. citizen cannot avoid contractual obligations to arbitrate international commercial disputes by bringing non-contractual claims under U.S. law in a U.S. court. In this very case, respondents brought RICO and common-law fraud claims in the U.S. against Telsim's officers, directors and shareholders rather than Telsim itself for the purpose of avoiding arbitration obligations. As in *Scherk*, the United States is connected to this dispute only because MCC "is an American corporation" and "some—but by no means the greater part—of the pre-contract

But the evidentiary weight to be assigned to a general choice-of-law clause does not vary from domestic to international transactions. In both situations, use of forum law (the FAA) offers the most predictable and efficient way to determine and enforce parties' intentions regarding arbitration. For that reason, parties must *clearly* express an intent to incorporate arbitrability rules other than forum law (the FAA) into their agreement, and the addition of a common choice-of-law clause alone is not sufficient to demonstrate that intent.

A. Respondents contend that, because this case presents that choice-of-law issue from an international perspective, it does not reach the circuit split that, according to respondents, turns on questions of federalism and preemption. Br. in Opp. 21-24. But respondents themselves admit that Chapter 2 of the FAA, like Chapter 1, is designed to ensure the enforcement of agreements to arbitrate, Br. in Opp. at 22, and thus advances "the FAA's raison d'etre, which is to overcome rules (whether created by state legislatures *or by courts*) that make it *more difficult* to enforce arbitration agreements." *Roadway Package System, Inc.* v. *Kayser*, 257 F.3d 287, 296 (3d Cir. 2001) (first emphasis added). The undisputed conflict in the lower courts, therefore, is not over the preemptive force of the FAA, but rather over whether inclusion of a general choice-of-law provision is sufficient evidence that parties intended to opt out of the FAA's rules favoring arbitrability in favor of the rules of the forum identified in the general choice-of-law clause. See *Roadway Package*, 257 F.3d at 294 ("We decline to construe the choice-of-law clause in this case as evidencing a clear intent to incorporate Pennsylvania's standards for judicial review [into the parties'

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negotiations" occurred here. 417 U.S. at 517 n.11. It is precisely in international commercial disputes like this one that arbitration clauses (like those contained in the loan agreements giving rise to respondents' claims) must be respected.

agreement]."). That question does not depend on whether the choice-of-law provision selects state or foreign law.[5]

2. Respondents also err when they defend the court of appeals' reliance on Swiss law to decide petitioners' motion to compel arbitration. Although the court below suggested that "applying the parties' choice of law is the only way to ensure uniform application of arbitration clauses within the numerous countries that have signed the New York Convention," Pet. App. 19a, that approach has led to far from predictable results even here: Who could have predicted that a Finnish corporation (Nokia) would be able to obtain a multi-billion dollar judgment from a U.S. court against Turkish nationals for the value of loans to a Turkish company under agreements that called for the resolution of "all disputes" through arbitration in Switzerland? The appropriate and predictable result would have been for the district court to compel arbitration of respondents' claims, or to stay litigation pending the Swiss tribunal's determination of whether the claims were subject to arbitration. Applying the FAA accomplishes that goal without disrupting the parties' expectations regarding arbitration.[6]

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[5] Respondents do not identify a single case that supports using a choice-of-law clause differently in international cases than in domestic cases. In fact, even the Second Circuit has routinely looked to the FAA, not the law chosen by a general choice-of-law clause, to decide arbitrability questions in international cases. See, e.g., *Campaniello Imports, Ltd.* v. *Saporiti Italia S.p.A.*, 117 F.3d 655, 666-668 (2d Cir. 1997).

[6] Respondents' claim that petitioners "sought arbitration only under U.S. or Swiss equitable principles" Br. in Opp. 7, 24 n.13, is incorrect. In fact, the motion to compel arbitration relied on the FAA's prohibition against efforts to plead around arbitration agreements by adding claims against non-signatories. See C.A. App. 701. "In addition," petitioners argued that "signatories to an arbitration agreement can be compelled to arbitration by non-signatories based on a theory of estoppel." C.A. App. 702. The court of appeals thus did *not* find that petitioners' legal arguments under the FAA had been "waived." Pet. App. 16a.

3. Respondents do not seriously defend the court of appeals' application of the FAA to decide some arbitration issues, and Swiss law to determine others, as advancing the interest of predictability. To the extent forum law (the FAA) properly governs the power of the court of appeals to decide questions about the arbitrability of respondents' claims, Br. in Opp. 28, forum law (the FAA) likewise governs petitioners' motion to compel arbitration. Moreover, petitioners "told" the court of appeals (correctly) that "defenses to arbitrability based on Swiss law are for the arbitrators, and not for this [c]ourt, to decide," Pet. C.A. Supp. Br. 19 (July 14, 2004), and that "Swiss law vests the arbitral tribunal with authority to determine its own jurisdiction," *id.* at 24.

III. Respondents' Alternative Ground Is No Barrier To Review.

The court below rejected application of the "Fugitive Disentitlement Doctrine" in this case in a separate ruling, explaining that "a nonresident who appeals an adverse judgment is in a different position than the typical fugitive who leaves a jurisdiction for the sole purpose of evading a judgment," and that the jurisdictional issues presented by the appeals are not affected by the fact that petitioners have not returned to the United States following entry of judgment. Pet. App. 48a; see also *Degen* v. *United States*, 517 U.S. 820, 828-829 (1996) ("Th[e] respect [accorded a court's judgments] is eroded, not enhanced, by too free a recourse to rules foreclosing consideration of claims on the merits."). The doctrine is thus inapplicable in this case, and has no bearing on the Court's review of the important issues that have divided the courts of appeals and that are squarely presented by the petition.

CONCLUSION

For the foregoing reasons and those stated in the petition, the petition should be granted.

Respectfully submitted,

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APRIL 25, 2005